SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1964~~ 1965

No. ~~754~~ 30

IDAHO SHEET METAL WORKS, INC.,
PETITIONER,

vs.

W. WILLARD WIRTZ, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[fol. A]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

Civil Action File No. 3745

ARTHUR J. GOLDBERG, Secretary of Labor,
United States Department of Labor, Plaintiff,

v.

IDAHO SHEET METAL WORKS, INC.,
a Corporation, Defendant.

COMPLAINT—Filed February 12, 1962

I

Plaintiff brings this action to enjoin defendant from violating the provisions of section 15(a)(2) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.*), hereinafter referred to as the Act.

II

Jurisdiction of this action is conferred upon the Court by section 17 of the Act.

III

Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Idaho, having a place of business located at Burley, Idaho, within the jurisdiction of this Court, and is, and at all times hereinafter mentioned was, engaged at that place of business in the fabrication and installation of sheet metal items and general sheet metal work.

IV

At all times hereinafter mentioned defendant employed, and is employing, approximately 9 employees in and about its aforesaid place of business in the fabrication and installation of sheet metal items and general sheet metal work. Sheet metal items and work fabricated by the said [fol. B] employees is installed by them in the facilities of commercial and industrial customers of the defendant and used by said customers in the production of goods for interstate commerce, and the said employees have been, and are, therefore, engaged in the production of goods for interstate commerce within the meaning of the Act.

V

Defendant repeatedly has violated, and is violating, the provisions of sections 7 and 15(a)(2) of the Act by employing its employees engaged in the production of goods for interstate commerce, within the meaning of the Act as aforesaid, for workweeks longer than 40 hours without compensating these employees for their employment in excess of 40 hours in any workweek at rates not less than one and one-half times the regular rates at which they were employed.

VI

Since May, 1959, defendant repeatedly has violated the provisions of section 15(a)(2) of the Act in the manner hereinabove alleged and a judgment enjoining and restraining said violations is expressly authorized by section 17 of the Act;

Wherefore, cause having been shown, plaintiff prays judgment permanently enjoining and restraining defendant, its agents, servants, employees, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of section 15(a)(2) of the Act.

Charles Donahue, Solicitor of Labor; Kenneth C. Robertson, Regional Attorney; H. A. Kelley, Attorney, Attorneys for Arthur J. Goldberg, Secretary of Labor, United States Department of Labor, Plaintiff.

P. O. Address: Office of the Solicitor, United States Department of Labor, 1305 Third Avenue, Sixth Floor, Seattle 1, Washington, Tel. No.: MUtual 2-3300, Ext. 1181.

[File endorsement omitted]

[fol. C]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

Civil Action File No. 3745

[Title omitted]

ANSWER—Filed March 6, 1962

Comes Now The Defendant in the above entitled action and in answer to Plaintiff's Complaint denies each and every allegation contained therein not hereinafter admitted, qualified or explained.

I.

Defendant admits Paragraph I but affirmatively alleges that the Fair Labor Standards Act of 1938, as amended, does not apply to the employer or its employees.

II.

Defendant admits that it is a corporation as referred to in Paragraph III of the Complaint and admits that it has a place of business in Burley, Idaho, but denies that it is

engaged solely in the business of fabrication and installation of sheet metal items and in connection therewith alleges that it is engaged as a retail service establishment selling and servicing to the public in general.

III.

With reference to Paragraph IV, the Defendant admits it employs approximately 9 employees in its place of business as heretofore alleged, and admits that its employees service and repair items fabricated or sold by Defendant and that some of its customers are commercial and industrial and produce goods for interstate commerce, but denies that said sales or services are in interstate commerce within the meaning of the Act.

[fol. D] IV.

Defendant denies Paragraph VI of the Complaint and the whole thereof, and by way of affirmative defense alleges that it is exempt from the provisions of the Act under Sections 13(a)(2) and 13(a)(4), and on the further grounds that neither Defendant nor its employees are engaged in the production of goods for interstate commerce and that they are therefore not engaged in interstate commerce as required by the Act.

Wherefore Defendant asks that the Plaintiff's cause of action be dismissed and that the Plaintiff take nothing by its Complaint.

Eli A. Weston, Attorney for Defendant, 711½ Bannock St., Boise, Idaho.

Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. E]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

Civil Action File No. 3752

[Title omitted]

COMPLAINT—Filed March 9, 1962

I

Plaintiff, Arthur J. Goldberg, Secretary of Labor, United States Department of Labor, brings this action to recover from the defendant Idaho Sheet Metal Works, Incorporated, a corporation, unpaid overtime compensation due its former employee, William D. Combs, under the provisions of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.*), hereinafter referred to as the Act.

II

Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Idaho, having a place of business located at Burley, Idaho, within the jurisdiction of this Court, and is, and at all times hereinafter mentioned was, engaged at that place of business in the fabrication and installation of sheet metal items and general sheet metal work.

III

(a) Jurisdiction of this action is conferred upon the Court by Section 16(c) of the Act and by the Judicial Code, 28 U.S.C. 1337 and 1345.

(b) By the provisions of Reorganization Plan No. 6 of 1950 (15 F R. 3174, 64 Stat. 1263), issued under the Reor-

[fol. F] ganization Act of 1949, 5 U.S.C., 133z to 133z-15, the functions of the Administrator of the Wage and Hour Divisions, United States Department of Labor, under the Act, were transferred to the Secretary of Labor.

IV

For his cause of action herein plaintiff alleges that:

(a) William D. Combs has filed with the plaintiff a written request to bring this action, claiming unpaid overtime compensation from the defendant.

(b) Defendant employed William D. Combs at its aforesaid place of business as a sheet metal worker during each workweek between March 6, 1960 and December 17, 1960. Throughout the period of his employment, as aforesaid, said employee regularly and customarily was engaged in the fabrication and installation of sheet metal items and general sheet metal work which was fabricated for and installed in the facilities of commercial and industrial customers of the defendant and used by said customers in the production of goods for interstate commerce. At all times mentioned herein, the said William D. Combs was engaged in the production of goods for interstate commerce within the meaning of the Act.

(c) During many workweeks within the aforesaid period, defendant employed the said William D. Combs in the production of goods for interstate commerce within the meaning of the Act, as aforesaid, for workweeks longer than 40 hours, and failed and refused to compensate him for such employment in excess of 40 hours in such workweeks at a rate not less than one and one-half times the regular rate at which he was employed, contrary to section 7 of the Act.

(d) As a result of said violations of section 7 of the Act by defendant there is due and owing from defendant the sum of $656.97, which amount has been demanded of the defendant and remains unpaid.

Wherefore, plaintiff demands judgment against the de-
[fol. G] fendant for $656.97, interest, and costs.

Charles Donahue, Solicitor of Labor; Kenneth C. Robertson, Regional Attorney; H. A. Kelley, Attorney, Attorneys for Arthur J. Goldberg, Secretary of Labor, United States Department of Labor, Plaintiff.

P. O. Address: Office of the Solicitor, United States Department of Labor, 1305 Third Avenue, Sixth Floor, Seattle 1, Washington, Tel. No.: MUtual 2-3300, Ext. 1181.

[File endorsement omitted]

[fol. H]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

Civil No. 3752

[Title omitted]

ANSWER—Filed April 23, 1962

Comes Now The Defendant in the above entitled action and in answer to Plaintiff's Complaint denies each and every allegation contained therein not hereinafter admitted, qualified or explained.

I.

Defendant admits that part of Paragraph I which alleges that the Secretary of Labor has instituted action to recover overtime compensation for Defendant former employee William D. Combs, but denies that such overtime compensation or any compensation is due said employee.

II.

As to Paragraph II, Defendant admits that it is a corporation organized under the laws of the State of Idaho with its place of business at Burley, Idaho, within the geographical jurisdiction of this Court, but denies that it is in the fabrication business but that on the contrary is a retail establishment as defined by the Act rendering services of a retail nature to the general public.

III.

Defendant admits the allegations of Paragraph III with reference to the sections of the Act and Judicial Code, but alleges in connection therewith that the Defendant is exempt as a retail service establishment under the Fair Labor Standards Act as amended.

[fol. I]

IV.

Defendant has no knowledge with reference to the allegation in Sub-paragraph (a) of Paragraph IV, and therefore neither admits nor denies the same. With reference to Sub-paragraph (b), Defendant admits that William D. Combs was employed by the Defendant during 1960 and that the dates alleged in said sub-paragraph are substantially correct, but Defendant denies that said employee was engaged in the production of goods for interstate commerce within the meaning of the Act, and on the contrary was engaged as an employee in a retail service establishment as defined by the Act and accepted by the industry. Defendant denies Sub-paragraphs (c) and (d) of Paragraph IV and denies that it owes the Plaintiff $656.97 or any other sum.

V.

In further answering the Plaintiff's Complaint, the Defendant alleges that Action No. 3745, filed on or about the

12th day of February, 1962, between the Plaintiff and the Defendant, is in the nature of a civil action and injunction seeking to restrain the Defendant from violating Sections 7 and 15(a)(2) of the Fair Labor Standards Act and that said action is now pending, and further that the Defendant has interposed an answer in said action claiming, among other things, exemption as a retail service establishment.

Wherefore Defendant asks that the Plaintiff's cause of action be dismissed and that the Defendant be allowed his costs and disbursements and such other and further relief as to the Court may seem just, fair and equitable.

Eli A. Weston, Attorney for Defendant, 711½ Bannock St., Boise, Idaho.

[fol. J] Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. K]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

Civil Action No. 3745

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff,

v.

IDAHO SHEET METAL WORKS, INC., a Corporation, Defendant.

Civil Action No. 3752

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff,

v.

IDAHO SHEET METAL WORKS, INC., a Corporation, Defendant.

PRE-TRIAL ORDER—September 3, 1962

These causes having come on for pre-trial conference before the Honorable Fred M. Taylor, United States District Judge, plaintiff appearing by James B. Leist, one of his attorneys, and defendant appearing by Eli A. Weston, its attorney, now, pursuant to Rule 16 of the Federal Rules of Civil Procedure and Rule 7-1 of the Rules of the United States District Court for the District of Idaho, the court makes the following Order reciting the action taken at the conference, the agreements made by the parties regarding the matters considered, and limiting the issues for trial to

those not disposed of by admissions or agreements of counsel:

1. *Nature of Actions*—Civil No. 3745 is an action by Arthur J. Goldberg, Secretary of Labor, United States Department of Labor, to enjoin the defendant, Idaho Sheet [fol. L] Metal Works, Inc., a corporation, from violating the overtime provisions of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 *et seq.*), hereinafter referred to as the Act.

Civil No. 3752 is an action by the Secretary to recover from the defendant unpaid overtime compensation allegedly due to its former employee William D. Combs under the provisions of the Act.

2. *Jurisdiction*—Jurisdiction in No. 3745 is conferred on this court by section 17 of the Act.

Jurisdiction in No. 3752 is conferred on this court by section 16(c) of the Act and by the Judicial Code, 29 U.S.C. 1337 and 1345.

3. *Amendments Allowed*—None.

4. *Actions Consolidated for Trial*—On the representation of plaintiff's attorney that the two actions involve common questions of fact and of law, and without objection by the defendant, Civil Action No. 3745 and Civil Action No. 3752 are hereby consolidated for trial.

5. *Admitted Facts*—The following facts are admitted and require no proof:

(a) Jurisdiction is conferred on this court by sections 17 and 16(c) of the Act and by the Judicial Code, 29 U.S.C. 1337 and 1345, as stated in paragraph 2.

(b) Defendant is and at all times hereinafter mentioned was an Idaho corporation, having an office and place of business in Burley, Idaho, within the jurisdiction of this court, and is and at all times hereinafter mentioned was engaged in Burley, Idaho, in the fabrication and sale of sheet metal products, to a lesser extent in the installation,

maintenance and repair of such products, and, to a small extent, in the sale of solder, sheet metal, water spouts, elbows and similar items.

[fol. M] (c) Defendant's total dollar volume of sales of goods or services (or both) in the years 1959, 1960, and 1961 was:

1959	$134,805.50
1960	309,546.75
1961	229,456.10

(d)(i) Defendant's total dollar volume of sales of goods or services (or both) to Shelley Processing Company, Burley, Idaho, in the years 1959, 1960, and 1961 was:

1959	$ 90,301.75
1960	46,336.95
1961	60,407.35

(ii) Shelley Processing Company is a trade name of the Ruby Corporation, a wholly-owned corporate subsidiary of the J. R. Simplot Company. The Shelley Processing Company is and for many years has been engaged at its Burley plant in the processing of potatoes into various dehydrated potato products such as instant mashed potatoes, potato flour, potato flakes, and similar goods made from potatoes.

(iii) Substantially all of the dehydrated potato products referred to in subparagraph (d)(ii) have been and are being produced for interstate commerce and have been and are being transported, offered for transportation, shipped, delivered and sold in interstate commerce from the Shelley Processing Company's Burley plant to points outside of the State of Idaho.

(iv) During many workweeks in the years 1959, 1960, and 1961 defendant's employees spent a substantial part of their total hours worked in fabricating (from stainless steel, copper, aluminum, galvanized iron or other sheet metals) potato handling and processing equipment, such

as vats, storage tanks, hoods, elevator buckets, chutes, etc., which was sold to and used by the Shelley Processing Company in the processing of potatoes into the dehydrated potato products referred to in subparagraphs (d)(ii) and (d)(iii). In certain of the aforesaid workweeks some of defendant's employees also spent a substantial part of their total hours worked in maintaining or repairing such equipment.

[fol. N] (e)(i) Defendant's total dollar volume of sales of goods or services (or both) to the J. R. Simplot Company, Heyburn, Idaho, in the years 1959, 1960, and 1961 was:

1959	$ 8,559.35
1960	180,721.85
1961	92,079.77

(ii) The J. R. Simplot Company is and for many years has been engaged in the processing of potatoes into various potato products. In 1959 and 1960 this company built a new plant at Heyburn, Idaho, to supplement and increase its existing production facilities, including a plant at Caldwell, Idaho, where it was and is engaged in the processing of various frozen potato products, including french fried potatoes, hashed brown potatoes, and potato patties. The new Heyburn plant was completed in the summer of 1960 and commenced regular production in September 1960. Since the latter date the J. R. Simplot Company has been engaged at its Heyburn, Idaho, plant in the processing of various frozen potato products such as french fried potatoes, hashed brown potatoes, and potato patties.

(iii) Substantially all of the frozen potato products produced in the aforesaid J. R. Simplot plant at Heyburn, Idaho, have been and are being produced for interstate commerce and have been and are being transported, offered for transportation, shipped, delivered, and sold in interstate commerce from said plant to points outside of the State of Idaho.

(iv) During many workweeks in the years 1959, 1960, and 1961 defendant's employees spent a substantial part of their total hours worked in fabricating (from stainless steel, copper, aluminum, galvanized iron or other sheet metals) potato handling and processing equipment such as vats, storage tanks, hoods, elevator buckets, chutes, etc., which was sold to and used by the J. R. Simplot Company in the processing of potatoes into the frozen potato products referred to in subparagraph (e)(iii). In certain of the aforesaid workweeks some of defendant's employees also spent a substantial part of their total hours worked in maintaining or repairing such equipment.

[fol. 0] (f)(i) Defendant's total dollar volume of sales of goods or services (or both) to Idaho Potato Processors, Inc., Burley, Idaho, in the years 1959, 1960, and 1961 was:

1959	$ 7,439.40
1960	15,907.86
1961	30,587.00

(ii) In 1957 Idaho Potato Processors, Inc., built a new plant at Burley, Idaho, to process potatoes into frozen potato products. Production was commenced in February 1958. Since that date Idaho Potato Processors, Inc., has been engaged at its Burley, Idaho, plant in the processing of potatoes into frozen potato products such as french fried potatoes, hashed brown potatoes, and potato patties.

(iii) Substantially all of the frozen potato products referred to in subparagraph (f)(ii) have been and are being produced for interstate commerce and have been and are being transported, offered for transportation, shipped, delivered, and sold in interstate commerce from the aforesaid plant of the Idaho Potato Processors, Inc., at Burley, Idaho, to points outside of the State of Idaho.

(iv) During many workweeks in the years 1959, 1960, and 1961 defendant's employees spent a substantial part of their total hours worked in fabricating (from stainless

steel, copper, aluminum, galvanized iron or other sheet metals) potato handling and processing equipment such as vats, storage tanks, hoods, elevator buckets, chutes, etc., which was sold to and used by Idaho Potato Processors, Inc., in the processing of potatoes into the frozen potato products referred to in subparagraphs (f)(ii) and (f)(iii). In certain of the aforesaid workweeks some of defendant's employees spent a substantial part of their total hours worked in maintaining or repairing such equipment.

(g)(i) Defendant's total dollar volume of sales of goods [fol. P] or services (or both) to Idaho Industries, Burley, Idaho, in the years 1960 and 1961 was:

1960	$13,103.59
1961	4,020.35

(ii) Idaho Industries, a corporation, was organized in 1958 for the purpose of constructing a potato processing plant at Burley, Idaho, for Ore-Ida Potato Products, Inc., Ontario, Oregon. Ore-Ida Foods, Inc., is and (under the name Ore-Ida Potato Products, Inc.) for many years has been engaged at its Ontario, Oregon, plant in processing potatoes into various potato products. The new plant at Burley was built in 1959 and 1960 to supplement and increase Ore-Ida's existing production facilities and to enable the company to process at their source potatoes previously transported from the Burley area to Ontario for processing. Production was commenced in September 1960. From that date until February 1961 Ore-Ida Potato Products, Inc., and since February 1961 Ore-Ida Foods, Inc., have been engaged at the Burley, Idaho, plant in question in the processing of potatoes into frozen potato products such as french fried potatoes, hashed brown potatoes, and "Tater Tots"—little balls of shredded potatoes.

(iii) Substantially all of the frozen potato products referred to in subparagraph (g)(ii) have been and are being produced for interstate commerce and have been and are being transported, offered for transportation, shipped, de-

livered, and sold in interstate commerce from the Burley, Idaho, plant referred to to points outside of the State of Idaho.

(iv) During many workweeks in the years 1960 and 1961 defendant's employees spent a substantial part of their total hours worked in fabricating (from stainless steel, copper, aluminum, galvanized iron and other sheet metals) potato handling and processing equipment, such as vats, storage tanks, hoods, elevator buckets, chutes, tables, etc., which was sold to and used by Ore-Ida Potato Products, Inc., and Ore-Ida Foods, Inc., in the processing of potatoes into the frozen potato products referred to in subparagraphs (g)(ii) and (g)(iii). In certain of the aforesaid [fol. Q] workweeks some of defendant's employees spent a substantial part of their total hours worked in maintaining or repairing such equipment.

(h)(i) Defendant's total dollar volume of sales of goods or services (or both) to The Great Atlantic & Pacific Tea Company (Produce Division), Burley, Idaho, in the years 1960 and 1961 was:

1960	$10,155.95
1961	3,414.00

(ii) Prior to 1960 The Great Atlantic & Pacific Tea Company (Produce Division) operated a fresh potato packing plant at Paul, Idaho. In 1960 the company built a plant at Burley, Idaho, to replace the fresh-pack facilities at Paul and extend the company's operations to the processing of frozen potato products. Paul is about three miles from Burley. Fresh-pack operations in the new plant started in October, 1960, and the production of frozen potato products commenced in December 1960. Since the latter date The Great Atlantic & Pacific Tea Company (Produce Division) has been engaged at its Burley, Idaho, plant in packing fresh potatoes and in the processing of potatoes into frozen potato products such as french fried potatoes, hashed brown potatoes, and potato patties.

(iii) Substantially all of the fresh potatoes and frozen potato products referred to in subparagraph (h)(ii) have been and are being produced for interstate commerce and have been and are being transported, shipped, delivered, and sold from the aforesaid plant of The Great Atlantic & Pacific Tea Company (Produce Division) at Burley, Idaho, to points outside of the State of Idaho.

(iv) During many workweeks in the years 1960 and 1961 defendant's employees spent a substantial part of their total hours worked fabricating (from stainless steel, copper, aluminum, galvanized iron and other sheet metals) potato handling and processing equipment, such as tables, vats, storage tanks, hoods, elevator buckets, chutes, etc., which was sold to and used by The Great Atlantic & Pacific Tea Company (Produce Division) in packing fresh potatoes and in the processing of potatoes into the frozen [fol. R] potato products referred to in subparagraphs (h)(ii) and (h)(iii). In certain of the aforesaid workweeks some of defendant's employees spent a substantial part of their total hours worked in maintaining or repairing such equipment.

(I)(i) Defendant's total dollar volume of sales of goods or services (or both) to Western Seed, Inc., Heyburn, Idaho, in the years 1959, 1960, and 1961 was:

1959	$ 313.50
1960	1,252.40
1961	861.80

(ii) Western Seed, Inc., is and since a date prior to 1959 was engaged at its plant in Heyburn, Idaho, in the processing of grains, grasses, and legumes into seed products, and in the wholesale sale and distribution of seed products.

(iii) Substantial quantities of the seed products referred to in subparagraph (I)(ii) have been and are being produced for interstate commerce and have been and are being transported, offered for transportation, shipped, delivered and sold in interstate commerce from the Western Seed,

Inc., plant in Heyburn, Idaho, to points outside of the State of Idaho.

(iv) During many workweeks in the years 1959, 1960, and 1961 defendant's employees spent a substantial part of their total hours worked in fabricating from galvanized iron and other sheet metals seed handling and processing equipment, such as tables, hoppers, chutes, sorters, etc., which was sold to and used by Western Seed, Inc., in the processing of grains, grasses, and legumes into the seed products referred to in subparagraphs (I)(ii) and (I)(iii). In certain of the aforesaid workweeks some of defendant's employees spent a substantial part of their total hours worked in maintaining or repairing such equipment.

(j)(i) Defendant's total dollar volume of sales of goods or services (or both) to Amalgamated Sugar Company at [fol. S] Burley and Paul, Idaho, during the years 1960 and 1961 was:

1960	$ 495.75
1961	11,559.80

(ii) Amalgamated Sugar Company is and since a date prior to 1960 was engaged at its plants at Burley and Paul, Idaho, in the processing of sugar beets and the manufacture of sugar therefrom.

(iii) Substantial quantities of the sugar referred to in subparagraph (j)(ii) have been and are being produced for interstate commerce and have been and are being transported, offered for transportation, shipped, delivered and sold in interstate commerce from the Amalgamated Sugar Company's plants at Burley and Paul, Idaho, to points outside of the State of Idaho.

(iv) During many workweeks in the years 1960 and 1961 defendant's employees spent a substantial part of their total hours worked in fabricating (from stainless steel, copper, galvanized iron and other sheet metals) sugar beet processing and sugar manufacturing equipment which was

sold to and used by the Amalgamated Sugar Company in the processing of sugar beets and in the manufacture of the sugar referred to in subparagraphs (j)(ii) and (j)(iii). In certain of the aforesaid workweeks some of defendant's employees spent a substantial part of their total hours worked in maintaining or repairing such equipment.

(k)(i) Defendant's total dollar volume of sales of goods or services (or both) to the Union Seed Company of Burley, Burley, Idaho, in the years 1959, 1960 and 1961 was:

1959	$477.55
1960	848.00
1961	288.00

(ii) Union Seed Company of Burley is and since a date prior to 1959 was engaged at its plant at Burley, Idaho, in the processing of grains, grasses, and legumes into seed products, animal feeds, wheat and similar commodities.

(iii) Substantial quantities of the commodities referred [fol. T] to in subparagraph (k)(ii) have been and are being produced for interstate commerce and have been and are being transported, offered for transportation, shipped, delivered and sold in interstate commerce from Union Seed's Burley plant to points outside of the State of Idaho.

(iv) During a number of workweeks in the years 1959, 1960, and 1961 defendant's employees spent a substantial part of their total hours worked in fabricating from galvanized iron and other sheet metals seed, feed, and grain handling and processing equipment, such as tables, hoppers, chutes, etc., which was sold to and used by the Union Seed Company of Burley in the handling and processing of the grains, grasses, and legumes into the commodities referred to in subparagraphs (k)(ii) and (k)(iii). In certain of the aforesaid workweeks some of defendant's employees spent a substantial part of their total hours worked in maintaining or repairing such equipment.

(L)(i) Defendant's total dollar volume of sales of goods or services (or both) to the Burley Flour Mills, Burley, Idaho, in the years 1959, 1960, and 1961 was:

1959	$ 1,358.28
1960	895.55
1961	1,102.70

(ii) Burley Flour Mills is and since a date prior to 1959 was engaged at its plant at Burley, Idaho, in the milling of flour from wheat and in the production of millfeeds.

(iii) Substantial quantities of the commodities referred to in subparagraph (L)(ii) have been and are being produced for interstate commerce and have been and are being transported, offered for transportation, shipped, delivered and sold in interestate commerce from Burley Flour Mill's plant to points outside of the State of Idaho.

(iv) During a number of workweeks in the years 1959, 1960, and 1961 defendant's employees spent a substantial part of their total hours worked in fabricating (from stainless steel, copper, aluminum, or galvanized iron) equipment such as bins, hoppers, chutes, etc., which was sold to and [fol. U] used by Burley Flour Mills in the production of the flour and millfeeds referred to in subparagraphs (L)(ii) and (L)(iii). In certain workweeks some of defendant's employees spent a substantial part of their total hours worked in maintaining or repairing such equipment.

(m)(i) Defendant's total dollar volume of sales of goods or services (or both) to the Boise Cascade Container Corporation, Burley, Idaho, in the years 1959, 1960, and 1961 was:

1959	$656.45
1960	410.09
1961	155.97

(ii) Boise Cascade Container Corporation is and at all times since a date prior to 1959 was engaged at its plant at

Burley, Idaho, in the manufacture of corrugated cardboard shipping containers.

(iii) Substantial quantities of the containers referred to in subparagraph (m)(ii) have been and are being produced for commerce and have been and are being transported, offered for transportation, shipped, delivered and sold in interstate commerce from Boise Cascade Container Corporation's Burley plant to points outside of the State of Idaho.

(iv) During several workweeks in the years 1959, 1960 and 1961 defendant's employees spent a substantial part of their total hours worked in fabricating from galvanized iron, and in installing, ducts, vents, and dampers in the plant referred to in subparagraphs (m)(ii) and (m)(iii).

(n)(i) Defendant's total dollar volume of sales of goods or services (or both) to persons or firms other than those identified in subparagraphs (d)(i) through (m)(iv) in the years 1959, 1960, and 1961 was:

1959	$25,606.72
1960	38,944.26
1961	24,979.36

(ii) Following is a sample list of sales or services (or both) referred to in subparagraph (n)(i) taken at random [fol. V] in the years 1959, 1960, and 1961:

Name of Customer	*Commodity or Service Performed*	*Amount Charged*
Cassia County Schools	Make one garbage disposal tray 18 Ga. stainless steel	$ 34.00
Charles Chadwick	Fabricate and install gutter	30.40
Craner Produce	Fabricate one 14 Ga. CRI pan Standpipe	114.00
Jensen Construction Co.	290 feet flashing. 2 transitions	134.65

Name of Customer	*Commodity or Service Performed*	*Amount Charged*
Burley Herald-Bulletin	Duct Work	$39.50
Carlson Brothers	Aluminum tool box	62.30
Max Dayley	One 16 Ga. black iron furnace base	14.00
Larry Boyd	Fabricate 1 bathroom vent	6.50
Frank Chadwick	Make planter box	14.00
Marion Moncur	Fabricate one stainless steel dairy sink. 22 Ga.	65.00
Toner's automotive service	Fabricate bench top	38.60
Wayne Brown	Fabricate black iron hopper for tractor	91.35
Feeders Grain Supply	Fabricate 20 Ga. Galvanized square roof jack on pitch as ordered	18.50
W. W. Paulson	Make 12 x 12 x 4½ angle	2.20
Clyde Ross	Fabricate and install chimney extension	16.00
Bill Barkdull	Fabricate 2 caps for milk cans	3.50
5th and 7th Ward LDS Church	3 strips .050 aluminum, 2″ x 66″	3.00
Shelby's IGA Foodliner	Fabricate stainless steel hood for chicken cookers	39.45

These sales or services may be considered representative of all sales or services (or both) referred to in subparagraph (n)(i). At all times in each of the years 1959, 1960, and 1961 defendant was engaged in making sales of goods or services (or both) to the general public.

(o)(i) The total number of sales of goods or services (or both) made by the defendant in the years 1959, 1960, and 1961 was:

	1959	822
[fol. W]	1960	1,090
	1961	1,064

(ii) The total number of sales of goods or services (or both) made by the defendant to the firms identified in subparagraphs (d)(i) through (m)(iv) in the years 1959, 1960, and 1961 was:

1959	317
1960	434
1961	405

(iii) The total number of sales of goods or services (or both) made by the defendant to persons or firms other than those identified in subparagraphs (d)(i) through (m)(iv) in the years 1959, 1960, and 1961 was:

1959	505
1960	656
1961	659

(p) At all times in each of the years 1959, 1960 and 1961 defendant had one, and only one, establishment or place of business. That establishment or place of business was originally located at 759 Overland Street, Burley, Idaho. On July 1, 1960, defendant moved to its present location at 1197 East Main Street, Burley, Idaho. Defendant's place of business was and is a distinct physical establishment and was and is operated as a single unit. Its office and that portion of the premises not devoted to fabricating and processing activities was and is open at all times during regular business hours to that portion of the general public having business to transact at a custom sheet metal fabricating shop. Substantially all of the goods sold by said establishment were and are made and processed individually to meet the needs of each customer according to his own specifications.

All of the goods made and processed in said establishment have been and are being sold by said establishment.

(q) All of the services performed by the defendant for the persons and firms referred to in subparagraphs (c)(i) through (n)(ii) were performed on a so-called "time and material" basis—that is, the total amount which the defendant charged its customer for any given job was arrived at by adding the total charges for the labor required for the job at "X" dollars per hour plus the total charges for [fol. X] the material used in fabricating the articles or equipment supplied.

(r) In each of the years 1959, 1960, and 1961 more than 50 per cent of defendant's annual dollar volume of sales of goods or services was made within the State of Idaho.

(s) In each of the years 1959, 1960, and 1961 more than 75 per cent of defendant's annual dollar volume of sales of goods or services (or both) was not for resale.

(t) In each of the years 1959, 1960, and 1961 more than 85 per cent of defendant's annual dollar volume of sales of goods made or processed at defendant's establishments identified and referred to in subparagraphs (b) and (p) was made within the State of Idaho.

(u) Defendant employed the following employees at straight hourly rates of pay in the occupations and during the periods set forth opposite their names below:

Name	*Occupation*	*Beginning and Ending Dates of Employment*
Clifford L. Jackson	General Manager	6- 1-59 to 5-20-61
Gary O. Clark	Clean-up Boy	4-24-60 to 5- 7-60
Kosuvas C. Audritsakis	Sheet Metal Worker	1-15-61 to 2- 4-61
Ray L. Avery	" " "	7-24-60 to 8- 6-60
R. B. Boedecker	" " "	6-19-60 to 8-27-60
Clayton L. Cassingham	" " "	6- 1-59 to 4- 1-61

Name	*Occupation*	*Beginning and Ending Dates of Employment*
William E. Combs	Sheet Metal Worker	3- 6-60 to 12-17-60
Frederick L. Dickson	" " "	6-14-59 to 5-20-61
Robert A. Green	" " "	6-14-59 to 5-20-61
Roy L. Grindrod	" " "	2-29-60 to 5-13-61
Stanley W. Hansen	" " "	2-29-60 to 3- 5-60
Billy C. Shockey	" " "	2-19-61 to 5-20-61
Curtis E. Shockey	" " "	8-23-59 to 5-20-61
Robert A. Starkey	" " "	6-14-59 to 11-21-59

(v) During the years 1959, 1960, and 1961 defendant em- [fol. Y] ployed many of the employees named in subparagraph (u) for many workweeks longer than forty hours without compensating them for their employment in excess of forty hours during such workweeks at rates not less than one and one-half times the regular rates at which they were employed. The workweeks and the employees referred to in this subparagraph were the same workweeks and the same employees referred to in subparagraphs (d)(iv), (e)(iv), (f)(iv), etc., through (m)(iv).

(w) Since February 12, 1962, the date on which the complaint in Civil Action No. 3745 was filed, defendant has employed, and it is employing, many of its employees for workweeks longer than forty hours without compensating them for their employment in excess of forty hours in such workweeks at a rate not less than one and one-half times the regular rates at which they are employed. Said employees regularly spend a substantial part of their total hours worked in such workweeks in fabricating sheet metal products sold to and used by the Shelley Processing Company, the J. R. Simplot Company, Idaho Potato Processors, or other such firms identified in subparagraphs (d)(i) through (m)(iv) in the processing of potatoes into dehy-

drated or frozen potato products, substantially all of which have been and are being transported, offered for transportation, shipped, sold and delivered in commerce from the plants of said firms in Idaho to other States. In certain workweeks some of defendant's employees spend a substantial part of their total hours worked in maintaining or repairing such sheet metal products.

6. *Issues of Fact*—The following issues of fact, and no others, remain to be litigated upon the trial:

(a) Whether, during the years 1959, 1960, and 1961, 75 per cent of defendant's sales of goods or services (or both) was recognized as retail sales or services in the particular industry in which the defendant was and is engaged; and

(b) Whether defendant's establishments identified in paragraphs 5(b) and 5(p) were and are recognized as retail establishments in the particular industry in which the defendant is engaged.

[fol. Z] 7. *Mixed Issue of Fact and Law*—The following issue of mixed fact and law, and no other, remains to be litigated upon the trial:

Whether defendant's business is, by nature, outside the retail concept.

8. *Issues of Law*—The following issues of law, and no others, remain to be litigated upon the trial:

(a) Whether any of the defendant's employees were engaged in the production of goods for commerce within the meaning of the Act.

(b) Whether all of defendant's employees were exempt from the overtime requirements of the Act by virtue of their employment by a retail or service establishment as defined in section 13(a)(2)-13(a)(4) of the Act.

9. *Additional Matters Agreed on by the Parties*—The parties agreed that if the issues of law set forth in paragraph 8 are resolved in the plaintiff's favor, judgment may

be entered in Civil Action No. 3752 for the plaintiff and against the defendant for $500 plus costs. The right of appeal by either party shall not in any event be affected.

10. *Witnesses*—The names and addresses of the witnesses to be offered at the trial, together with an indication of the nature of the testimony to be given by each, are as follows:

Plaintiff—

On his case in chief, two as yet unidentified officials of defendant's customers identified in paragraphs 5(c) through 5(h) who will testify regarding the purpose, nature and necessity of the work which defendant performed for said customer. Plaintiff may also offer one or more witnesses, including experts, to rebut testimony adduced by the defendant on the exemption issue.

Defendant—

Vestal Coffin
Herbert Shockey

[fol. AA] Two as yet unidentified representatives of manufacturers and wholesalers of sheet metal products.

11. Exhibits—

Plaintiff will offer photographs of defendant's establishment identified and referred to in paragraph 5(b) and (p).

Defendant—copy of store license from State of Idaho.

The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and of law remaining to be litigated, this Order shall control the subsequent course of this action, unless modified at the trial to prevent manifest injustice.

Dated: Sept. 3, 1962.

Fred M. Taylor, United States District Judge.

Approved as to form and content:

James B. Leist, Attorney for Plaintiff.

Eli A. Weston, Attorney for Defendant.

[fol. 1]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

No. 3745

Honorable Fred M. Taylor, Judge

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff,

vs.

IDAHO SHEET METAL WORKS, INC., a Corporation, Defendant.

Reporter's Transcript of Proceedings—September 4, 1962

Boise, Idaho

APPEARANCE OF COUNSEL:

For the Plaintiff: Mr. James B. Leist, U. S. Department of Labor, 1818 Smith Tower, Seattle, Washington.

For the Defendant: Mr. Ely Weston, 711½ Bannock Street, Boise, Idaho.

[fol. 4] The Clerk: Number 3745, Arthur J. Goldberg, Secretary of Labor, United States Department of Labor, vs. Idaho Sheet Metals Works, Inc., a corporation, for Court trial.

The Court: Are you ready to proceed, Gentlemen?

Mr. Leist: The Plaintiff is ready, Your Honor.

Mr. Weston: The Defendant is ready.

The Court: You may proceed.

Mr. Leist: Mr. Carrier.

WALLACE J. CARRIER a witness called on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record.
The Witness: Wallace J. Carrier.

Direct examination.

By Mr. Leist:

Q. Where do you live, Mr. Carrier?
A. Burley, Idaho.
[fol. 5] Q. How long have you lived there?
A. Since I have moved back, I have been there fifteen years. I was born and raised in Burley, Idaho.
Q. What is your occupation?
A. I am manager of the Shelley Processing Company in Burley, Idaho.
Q. How long have you been the manager?
A. For fifteen years at Burley.
Q. What did you do before that?
A. I was employed by the J. R. Simplot Company at Caldwell, Idaho; I was manager of a processing plant at Bakersfield, California for six years previous to that.
Q. Let me interpolate here and ask how you happen to be up on the stand right now.
A. I was issued a subpoena by Arthur J. Goldberg, Secretary of Labor, to appear at the hearing.
Q. Mr. Carrier, I came down to Burley the latter part of last week, I believe on Friday, and talked to you for a little while; do you recall that?
A. I do.
Q. And you were kind enough to show me through the Shelley plant, is that correct?
A. Yes, sir.
[fol. 6] Q. And you did it pursuant to the instructions of your superiors?
A. That is correct.

Q. I believe during our discussion there in Burley last Friday you mentioned that you have been connected with the sheet metal industry yourself at one time; is that correct, sir?

A. I operated—owned and operated a custom machine shop—very little sheet metal, more on the heavier metal.

Q. What is that?

A. The heavier gage than the sheet metal.

Q. When was that?

A. That was in 1946, '47, and '48.

Q. For three years?

A. Yes, three years.

Q. Now, reverting to your present occupation, I believe the record shows to some extent, but I will ask you to state what the Shelley Processing Company produces.

A. We produce in Burley dry potato products—dehydrated potato products.

Q. Specifically?

A. Potato granules or instant potato, and we dehydrate potato sliced and dices of seven different sizes, the dry [fol. 7] potatoes.

Q. How long has the Shelley processing plant been in this business?

A. The Shelley Processing Company, Inc., was incorporated in Burley in 1949. Two years previous to that it was a part of the J. R. Simplot Company.

Q. It is now, as I understand, some sort of a corporate subsidiary of the J. R. Simplot Company?

A. That is right.

Q. When was the Burley plant which you manage built?

A. The Burley plant, that plant was built in 1928 as it was when J. R. Simplot Company bought it.

Q. Now, Mr. Carrier, I might say, for your information, that the particular years involved in the law suit are 1959, 1960, and 1961; this company and this plant at Burley were in operation prior to those years?

A. Yes, that is right.

Q. And making the same product?

A. That's right.

Q. I understand that your operations are, to some extent, seasonal in nature; is that true?

A. Yes, sir.

[fol. 8] Q. Will you give us an idea of what your average operating season is?

A. We call the average operating season, roughly, two hundred days from the first of September to the last of May or June.

Q. Is that approximately what you operated last year, that is to say, 1961?

A. That's right, yes.

Q. Mr. Carrier, at the cost of much blood, sweat, and tears, Mr. Weston and I, on behalf of the Plaintiffs and Defendants in this case, have stipulated—agreed on a great many of the facts, included among them is a stipulation to the effect that during many work weeks of 1959, 1960, and 1961, the Idaho Sheet Metal Works employees spent a substantial part of their total hours worked of fabricating potato processing equipment for the Shelley Processing Company, and we have agreed that the Idaho Sheet Metal Works income from Shelley was $90,000 in 1959 and $46,000 in 1960—in round numbers—and about $60,000 in 1961; and finally, insofar as this statement is concerned, the parties have agreed that this potato processing equipment that I referred to before, consists of such items as, and I quote—

The Court: Counsel, are you doing this for the edification [fol. 9] of the witness? The facts are in the record.

Mr. Leist: I have three more words.

The Court: Are you trying to brief the witness or are you going to ask him a question?

Mr. Leist: I am going to.

The Court: Ask him.

Mr. Leist: May I finish the sentence?

The Court: Yes.

By Mr. Leist:

Q. The parties have agreed that the equipment was vats, storage tanks, hoods, elevator buckets, chutes, and so forth. Now, the first question that I wanted to ask you is simply, do you agree with the accuracy of this last enumeration here; did the defendant supply you with these various items of equipment?

A. Yes, they did.

Q. Now, can you think of any other equipment that they supplied to you during these three years that we have not enumerated he[illegible]

A. Yes, I th[illegible] of one—one major item was repairing and rebuilding the drying equipment which was damaged in the fire and explosion.

Q. Repair and rebuilding?

[fol. 10] A. Right.

Q. Of drying equipment?

A. Right.

Q. When did this explosion occur?

A. We had a fire and explosion in 1959, I couldn't state the specific date, and another in 1961.

Q. Now, as I understand it—as a matter of fact, I believe you have testified that the product which Shelley Products produces is dehydrated potato products.

A. Right.

Q. Dehydration is the purpose of that plant being there, dehydrating potatoes?

A. That is correct.

Q. And this equipment that you have just referred to which the Defendant repaired and rebuilt was dehydrating equipment?

A. Right.

Q. Now, referring back to those general words that I quoted a moment ago, I would like to take the first, the vats, and ask you if you can be a little more specific than that and tell us what kind of vats has the Defendant fabricated for Shelley Processing Company; can you name one?

[fol. 11] A. Well, I don't call them vats—I have never

used that—we call them tanks, bins, or hoppers—let's put it that way.

Q. Do they have some kind of a name; I am asking that so it will be easier to talk about them?

A. No, vats and tanks would cover it. We have surge tanks and hoppers, they are the same.

Q. That is the type of thing I am getting at—a receiving vat; would that be a vessel?

A. Right.

Q. Alright. Now, can you take one and tell us where it is located in the processing line?

A. We have receiving tanks that is located, I'll say, before or after the trim tables which receives the potatoes from the trim tables, which goes into all of the lines. We have four such tanks after the potatoes go over the trimming tables and they go to the receiving tanks, and they go on an even flow or controlled feed in the individual processing lines.

Q. Let's stop there, Mr. Carrier, and I want to ask you to describe these tanks.

The Court: Counsel, in view of the very fine pre-trial order in which you set out that the equipment is processed and built for this company, and the equipment was used for the production of products in interstate commerce, is it nec-[fol. 12] essary to go into all of the details of what the equipment is?

Mr. Leist: I believe, Your Honor, that it will have a bearing on one of the prime issues of the case, in fact, I am certain that it will. I feel that it is necessary to show, in somewhat greater detail than the pre-trial order does, what equipment we are talking about. Ideally, it might be better for Mr. Carrier to testify at two different points—here and as a rebuttal witness, but because I know he is an extremely busy man at this time of year, I thought that I would elicit all of the testimony at this time.

The Court: Maybe I don't understand the question at issue. You have narrowed the issues in the pre-trial order. I don't understand that there is any dispute as to what the

items are or what they were used for. I don't know or see the point of your going into detail as to what each piece of equipment is. It seems you are taking unnecessary time.

Mr. Leist: If the Court will permit, I have a certain plan about the case. I believe it is important testimony here and I will appreciate it if the Court will permit me to continue.

The Court: I am not trying to cut your case down but I [fol. 13] don't see the necessity of going into something that has been agreed on.

Mr. Leist: Well, sir, this particular point has not been agreed on.

The Court: Very well, go ahead then.

By Mr. Leist:

Q. Mr. Carrier, I will ask you now to describe this receiving tank that we were talking about in terms of dimensions, first; how long is it, how wide, and how high is it, to the best of your recollection?

A. Approximately three feet wide, four feet high, and about ten feet long.

Q. Now, also, to the best of your knowledge, what is its capacity—how much liquid will it hold?

A. Liquid, I will have to guess.

Q. Excuse me, I don't know what it holds, so whatever it is designed to hold, how much of it will it hold?

A. Approximately 5,000 pounds of peeled potatoes.

Q. What kind of metal is it made of?

A. Stainless steel.

Q. Do you happen to know the gage of the stainless steel?

A. I would have to guess—12 gage.

[fol. 14] Q. Twelve?

A. Right.

Q. Is that a heavy or light gage?

A. Its fairly heavy on stainless steel or sheet metal—that is my interpretation.

Q. That is a type of storage tank?

A. Yes.

Q. Would you describe a hood in somewhat the same way that you have the tank in the terms of its dimensions —what purpose does the hood serve?

A. The hood carries off the steam and vapor that is in the plant through the roof into the atmosphere, they are vent stacks.

Q. Can you think of one particular hood in your plant and tell us where it is?

A. We have hoods over each end of the cookers, which are approximately five feet square on the bottom and about four feet high where they go to the vent stacks.

Q. Are they also made out of stainless or some other metal?

A. We have galvanized and stainless—we have about fifty in the plant.

Q. Do you know what the gage of the metal is?

A. About eighteen gage.

[fol. 15] Q. That is lighter?

A. Yes, that is lighter.

Q. And the elevator buckets, what are they, sir?

A. We have three different types of elevator buckets in the plant—we have plastic, and galvanized, and stainless steel buckets.

Q. Does the Defendant make all three of the types for you?

A. Not all three, no.

Q. I am interested in the ones, the buckets that the Defendant has made for you.

A. In the past, I would say three or four years, that the elevator buckets that the Defendant has made have been out of stainless steel.

Q. And I presume that the mane, that the elevator bucket, is a sort of hoisting apparatus?

A. That's right.

Q. How does it operate?

A. They are bolted on to a vertical lift belt at twelve inch intervals, and it goes to the top and is discharged out of the top.

Q. The purpose is to get the product from one point to another in the processing line?

A. Right.

[fol. 16] Q. What of the chutes, what do you use them for?

A. Pan or transfer conveyors to transfer product from one point to another or one belt to another.

Q. What does a chute look like?

A. Well, I could describe it best as a deep trough—you have a bottom and two sides on it, and the product slides down to something else.

Q. Can you describe, in your mind's eye, or think of one that is average—not the longest and not the shortest—a particular chute, and describe it in terms of its length?

A. We have chutes at the end of the trim tables about ten inches wide, eight inches deep, with a round bottom, and approximately twelve feet long where the potatoes are transferred from the trim table into a conveyor.

* * * * * * *

[fol. 17] By Mr. Leist:

Q. Mr. Carrier, I believe that you have already just now [fol. 18] testified that this equipment which we have referred to here as the elevator buckets could properly be called hoisting equipment; is that correct?

A. That's correct.

Q. I believe you told me when I was down to talk with you on Friday that Mr. Simplot gives you a pretty wide latitude about the operation of your plant from day-to-day as to what you are going to do in the way of remodeling or revamping the production line from year-to-year?

A. That is correct up to a point. We talk it over and he says to do it or not and the details are left up to management.

Q. I believe you told me some rather remarkable things of the extent you have taken advantage of the lattitude and revamped the production line in the last few years. Will you tell the Court about it?

A. Not so much I have taken advantage of the lattitude, but through the company we have changed our plant seven years in a row. I have dismantled the plant and rebuilt it—the equipment every year for seven years. We have made radical changes in the processing—one is the increased production and the other is the new methods of production. A relatively new product, we feel, takes changes every year.

[fol. 19] Q. Now, I would assume that when you get ready to make one of the major operations in the plant that this is done on the basis of the preceding year's experience, is that correct?

A. Yes.

Q. And I would assume that you have a pretty good idea of how you want to change things?

A. Of the company personnel, yes.

Q. How do you go about deciding who is going to do the work?

A. We talk it over with Mr. Jones and Mr. Simplot, and from there on down its left up to management to get it done.

Q. To you, in other words?

A. Right.

Q. Now, is a good part of the work sheet metal work?

A. A portion of it—I couldn't say a good part of it, it depends on what we are doing—it could be, or a minor item, if you are changing your building.

Q. How do you decide who is going to do it, what firm?

A. That is up to management—to me.

Q. You are a part of management; do you have anything to say about it?

[fol. 20] A. Yes, I have quite a bit to say about it. At times we call our people in from other plants. A lot enters into the size of the job and how much time we have to do it.

Q. Its obvious from the agreed facts that you have, in the last three years at any rate, given this work, or a good part of it, to the Defendant here, the Idaho Sheet Metal Works?

A. That's right.

Q. How do you go about letting them know what is to be done?

A. Personal contact.

Q. Your personal contact?

A. That is correct, yes.

Q. You get in touch with whom?

A. The manager of the Idaho Sheet Metal.

Q. Who is that?

A. I dealt the last three years with Cliff Jackson, the man at Burley.

Q. Tell us what you do, Mr. Carrier; do you go to his place of business or does he come to yours?

A. Either way, I am at his office or he is at our place. We go on the job and I tell him what I want to do and we draw the sketches on paper or the floor and he goes back and starts to build it.

[fol. 21] Q. Who makes the sketches?

A. Both of us. In some cases we do the sketch work in the office—we do the sketches of the dimensions and show it to him and say, "Build it".

Q. Is there a formal contract for the work?

A. No. There have been purchase orders or authorization on the work in the form of a purchase order or written order.

Q. Do you know ahead of time how much work will be done?

A. I know at the spring of the year how much is going to be done that summer.

Q. During the whole summer?

A. Yes.

Q. And this is something that you tell Mr. Jackson when you are talking to him and drawing up the sketches?

A. Not so much on their individual end, but the company budget that I propose and submit to our general office that the sheet metal work is included on.

Q. You have an idea of what is going to be done in the way of repairs and remodeling?

A. Yes.

Q. And you tell Mr. Jackson?

[fol. 22] A. No. I might work a week or two, or a job at a time before I tell him what I want.

Q. Now, what about the matter of costs; is there some agreement about how much?

A. On any of our jobs that we plan ahead and talk to Idaho Sheet Metal, whether its pipe or sheet metal, I have a good idea of what the job is going to cost. Our personnel has gone over it and presented it to the general office and we have a good idea of each individual cost.

Q. You, having a background in sheet metal, does that have anything to do with it?

A. Yes, I can figure the square feet, and the pounds of metal and the labor.

Q. And you and Mr. Jackson estimate the labor together?

A. That's right, we do.

Q. Now, could you say that you know before you start out on these alterations in a given year—do you know just about how much they are going to cost?

A. In round figures. I have missed it quite a few times, and sometimes I have hit it pretty close on the proposed budget.

Q. And the matter of payment; how do you pay Idaho Sheet Metal for the work that they do?

[fol. 23] A. They present me with an invoice monthly, or every week, or every two weeks, and its after a certain phase of the job, and we put labor and material on the particular job.

Q. And they present you with an invoice and you pay it?

A. Right.

Q. That is not at a stated interval?

A. Most of the time I think it is on a monthly basis. There have been different payments.

Q. As the work progresses?

A. Right.

Q. Mr. Carrier, one thing that I would like to ask you about the work, does the Idaho Sheet Metal Works employees install some of it?

A. Yes, some of it they do.

Q. Does this—is this more or less a regular thing?

A. It depends on the job that it is and the availability of the men that I have, and, as I say, the particular job. If we have men available we work together on a lot of jobs, Idaho Sheet Metal men and my men under my supervision or theirs getting the work done.

Q. Some of the work can be fabricated in the Defendant's [fol. 24] plant, is that correct?

A. Some of it can be prefabricated—its hard to answer the question. Some can be, yes.

Q. And some of it has to be done on the site where it will be installed?

A. That is correct, yes.

Q. Mr. Carrier, do you think that it is fairly accurate to refer to the things that the Idaho Sheet Metal Works make for Shelley as "potato processing equipment"; is that a fair name to put on it?

A. Yes, I do.

Q. Could you also say that it was potato dehydrating equipment?

A. Yes, I would say that everything they have built has fit into the processing plant for dehydrating or processing.

Q. Who, other than the Shelley Processing Company, would have use for equipment of this type?

A. Well, there is other plants several places in the United States that use similar equipment or portions of similar equipment, or could use it—maybe a dozen or fifteen—or there is other types of plants that use the other equipment —the hoods, and stacks, and such, they could be used on other equipment.

Q. Do you think that it would be fair to say that the [fol. 25] market for the type of equipment that Idaho Sheet Metal Works makes for Shelley is limited?

A. Would you ask the question again.

Q. Do you think it would be fair to say that the market for the type of equipment that the Defendant makes for your company is limited?

A. Well, I really don't know how to answer the question. What do you mean by "limited"?

Q. If you don't know how to answer it, say so, and that is that.

A. I don't know how to answer it.

Q. Mr. Carrier, this work that is done every year, or from year-to-year; to what extent do you oversee it or supervise it during its processing?

A. One hundred per cent. I am there during all of the working hours.

Q. Mr. Carrier, you have said, did I understand, that you have lived in Burley for fifteen years?

A. I have been back for fifteen years. I was gone for five years. I was born and raised in Burley and was gone for five years and I have then been there fifteen years since I moved back.

Q. Where is downtown in Burley?

A. We speak of downtown as around the stop light—the corner of Main and Overland.

[fol. 26] Q. And I believe that you have been out to the Idaho Sheet Metal Works?

A. Right.

Q. How far is it from downtown out to the plant?

A. I'd say roughly three-fourths of a mile.

Q. What kind of a building is it?

A. A cinder block building.

Q. How many stories?

A. One story.

Q. Is it one floor—isn't it two stories high?

A. Well, its a high ceiling building, let's put it that way.

Q. What about, again, I am thinking of the outside—what kind of doors does it have in it?

A. The small door on the front is a metal door, and the side are of wood construction, sliding doors—large.

Q. What do you mean, in terms of feet?

A. Roughly fourteen feet wide and fourteen feet high.

Q. Do you recall that it has a show window?

A. I don't think it has, no.

Q. Where is it situated with respect to the highway?

[fol. 27] A. Its approximately two hundred feet off the highway, back in back of a used car sales yard.

Q. What does it look like on the inside?

A. Cinder block inside painted, with open beam ceilings, and a solid built up roof, I call it.

Q. There are some—is there anything in it?

A. Machinery and the small office and little store room in one corner.

Q. Does it have a cash register?

A. I don't know.

Q. It has employees?

A. Yes, there have been people working in there every time I have been in.

Q. What kind?

A. Sheet metal and welders, I guess.

Mr. Leist: That is all I have of this witness.

The Court: You may cross-examine.

Cross examination.

By Mr. Weston:

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[fol. 32] Q. Will you give us a farther example of the type of work that you ask of the defendant in addition to the building of the vats or tanks; generally, what are the other types of services that you use them for?

A. I could quote, as of right now, the past thirty days they have been installing equipment and remodeling some of the equipment and building miscellaneous chutes and conveyors.

Q. And guards for motors, and things of that kind?

A. That is correct.

• • • • • • •

[fol. 33] Q. When you say they install, that refers to the items referred to by Mr. Leist; the vats, and ducts, and the elevators, those?

A. There are very very few items in the last years that Idaho Sheet Metal have installed one hundred per cent. They are in the plant working under my supervision.

• • • • • • •

[fol. 35] Redirect examination.

By Mr. Leist:

* * * * * * *

Q. Now, I have only one other thing to ask you about and that is, that receiving tank which we talked about on your direct-examination and Mr. Weston asked when was it made, and you said in 1955; do you have other similar tanks that have been made in the last three years?

A. Yes.

Q. By the defendant?

A. Yes.

* * * * * * *

[fol. 36]

STIPULATION RE TESTIMONY OF MR. PAUL L. HANSON IF CALLED AS A WITNESS, ETC.

Mr. Leist: May I make this statement beforehand: the next witness is Mr. Hanson. He is the General Manager of the J. R. Simplot Company at Heyburn. To a certain extent his testimony will be cumulative. I want to show that this is not an isolated instance, the things that Mr. Carrier has testified to. Because we are running late, if Mr. Weston would stipulate that Mr. Hanson will testify to approximately the same thing, I will forego calling him.

Mr. Weston: Pardon me a moment.

The Court: Certainly.

Mr. Weston: May we have a moment for a conference, if the Court please?

The Court: Yes. We will take a ten minute recess. If you are going to forego calling the witness you better stipulate, if I may suggest, to the effect that if the witness were called he would testify to certain things. Whatever you can agree on.

(Whereupon the court recessed for ten minutes.)

[fol. 37] The Court: You may proceed.

Mr. Leist: Your Honor, I don't know whether we can stipulate in the particulars that the Court had in mind, but I would like to read a very rough proposed stipulation, and it has not had Mr. Weston's complete agreement. The Plaintiff and Defendant hereby stipulate that if Mr. Paul L. Hanson, the General Manager of J. R. Simplot, Heyburn, were called as a witness in this case, his testimony on the matters hereafter referred to would be substantially the same in all respects as the testimony which has just been given by Mr. Wallace J. Carrier, General Manager of the Shelley Processing Company, Burley, Idaho. Among the matters referred to are the type of equipment furnished to the J. R. Simplot Company by the Defendant, the function of that equipment, with the exception that the J. R. Simplot Company is engaged in the production of frozen foods rather than dehydrated foods at Heyburn, and the circumstances of arranging for the work to be done—performed between the defendant and the J. R. Simplot Company and the extent of the installation work as performed and as contrasted with fabrication, and repair, and maintenance, and the method of payment.

Now, I might say in that connection that it should be a [fol. 38] part of the stipulation that there would be this added difference, that the J. R. Simplot plant at Heyburn did not burn down and was not replaced as Mr. Carrier testified that the Shelley plant at Burley was. I don't believe we can make it exclusive, Your Honor. I may have overlooked something here—that I cannot do off the cuff.

The Court: You are making your record, I am not. Do whatever you want to do, you can stipulate or call him as a witness.

Mr. Weston: If the stipulation is acceptable to the Court; I would like to have it read back, if I may.

(Stipulation read by the Reporter.)

Mr. Weston: Agreed.

Mr. Leist: Agreed.

The Court: Very well. Call your next witness.

Mr. Leist: Mr. Shockey.

HERBERT J. SHOCKEY a witness called on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

[fol. 39] The Clerk: State your name for the record.
The Witness: Herbert Shockey.

Direct examination.

By Mr. Leist:

Q. Where do you live?
A. 2520 Hillway Drive, Boise.
Q. What is your occupation?
A. I am President of the Idaho Sheet Metal Company in Boise and President of the Idaho Sheet Metal Works in Burley.
Q. The latter company is the defendant?
A. That's right.

Mr. Leist: I am calling Mr. Shockey under Rule 34(b).
The Court: Very well.

By Mr. Leist:

Q. You were in the courtroom when Mr. Carrier testified?
A. Right.
Q. I would like to ask you about the machinery that Mr. Carrier said was in the plant there at Burley. Now, first, do you have a machine there called a "power shear"?
A. We do.
[fol. 40] Q. What is the function of that machine, Mr. Shockey?
A. To cut sheet metal with.
Q. And will it cut any and all gages of sheet metal?
A. Yes, all gages of sheet metal.
Q. From?
A. When you are talking of sheet metal, it only goes to ten gage, and then its plate.
Q. Will it cut ten gage?
A. It will.

Q. Is ten gage the heaviest?

A. No, it will cut heavier, it will cut three-sixteenths, but the shearer is not in good enough condition to cut more than ten gage constintantly, its an old machine—about fifty years old.

Q. How old?

A. Fifty years.

Q. Fifty years?

A. I'm a little wrong, it's about forty-six.

Q. One of the descriptive phrases, I suppose you would say about the shearer is that it is ten foot; what is that?

A. It will shear a piece of metal ten feet long.

[fol. 41] Q. That is the length of the metal that the machine will shear?

A. That is the maximum length.

Q. How big is the machine—how high is it?

A. Well, the overall height of the machine is approximately and and a half feet.

Q. How long?

A. Approximately thirteen feet.

Q. How wide?

A. Approximately four feet.

Q. How is it driven?

A. With a motor.

Q. What power?

A. Electric.

Q. Electric motor?

A. Yes, electric motor.

Q. Now, you also have a power roller in the shop, do you not?

A. That's correct.

Q. What is its function?

A. To roll up pipe—roll metal into pipe or troughing.

Q. Would it be to bend metal into a round shape?

A. That's right.

Q. What does this machine look like?

[fol. 42] A. Well, the type we have is what they term an initial type roll.

Q. How high is it?

A. Oh, approximately three feet.

Q. How wide?

A. Approximately thirty inches.

Q. How long?

A. I believe the one in Burley is overall about eight and a half feet.

Q. And is it also operated with electricity?

A. Yes, an electric motor.

Q. Do you have a power brake there?

A. Yes.

Q. What is its function?

A. To form the metal—forming metal.

Q. Does it form it in a different way than the power roller?

A. Yes.

Q. How?

A. It doesn't roll it into a cylinder—to bend it at an angle.

Q. Bend it?

A. Yes.

Q. What does it look like?

A. This particular one is a press brake and its approxi- [fol. 43] mately ten feet high, fourteen feet long, and about six feet through or wide—whichever way you'd say.

Q. How does it operate?

A. With electricity.

Q. Do you know how much a power shearer would cost you new?

A. New?

Q. Yes.

A. With the capacity that we have or the capacity that would cut as we have now?

Q. To replace it, one like yours.

Mr. Weston: I don't believe it is material as to what the equipment costs. I think what counsel is trying to establish is how well equipped the shop is, but I don't believe the cost would have anything to do with the issue.

Mr. Leist: I am trying to establish one thing in the case by asking him questions. My contention is that this is a

factory which does maybe a little retailing, and his contention is that it is a retailer that does no manufacturing, and I think this is very material.

The Court: He may answer.

[fol. 44] By Mr. Leist:

Q. The question, as I recall, how much would the replacement cost of this power shearer be?

The Court: Are we talking of the replacement or this one?

Mr. Leist: No, sir, how much it would cost to replace.

The Court: Objection sustained.

The Witness: Could I talk?

The Court: No, not until there is a question. We are talking of this plant, Mr. Leist, not another plant.

By Mr. Leist:

Q. Mr. Shockey, how many employees do you have at the present time?

A. I believe eleven or twelve.

Q. In this the average number of employees that you have had for the past three years?

A. Well, a custom sheet metal shop like ours is a very seasonal proposition. We do not manufacture anything and we can only do business when a customer calls and we build it to their customized conditions. We do not have but a few men we keep on the payroll throughout the year, in fact, I don't believe there is over two that is steadily employed in the plant, the rest of the men are seasonal. We [fol. 45] do not manufacture and stock pile to sell to anyone.

Q. I'm not certain that you answered the question, Mr. Shockey. All I wanted to know is, when you are operating, do you have eleven employes, or about that?

A. I would say approximately ninety days out of the year, yes.

Q. All right, sir.

A. However, that condition changes.

Q. Mr. Shockey, what goods do you carry in your inventory?

A. A little bit of down spout and a few conductor elbows, and bolts and nuts, and a few little pieces of copper, and quite a bit of sheet metal of various gages, we have twenty-five or thirty different types and gages of metal that we carry.

Q. Is the bulk of your inventory sheet metal?

A. Yes.

Q. And the other things like the drain spout, that is incidental?

A. Yes, incidental.

Q. Now, you buy the sheet metal in big sheets?

A. Well, they come in thirty-six and forty-eight inches, and ten feet long, that is the general size.

[fol. 46] Q. And then you use these machines that you have just described to do something to the metal, is that correct?

A. That's correct.

Q. And when the metal leaves your shop it is in a different shape and form than when it came in?

A. It depends on what the customer wants, correct.

Q. Do you sell any sheet metal as such?

A. Occasionally.

Q. What portion of your business is concerned with the selling sheet metal as such?

A. Well, that is a real tough question, it might be one per cent or it might be three.

Q. Very small in comparison with the rest of your business?

A. That's correct.

Q. Do you advertise in the daily newspaper?

A. In the Burley paper, yes.

Q. How often do you run an ad?

A. I can't answer that question.

Q. Is it daily?

A. When the manager of the plant gets up here he will answer the questions for you.

Q. Do you advertise on TV?

[fol. 47] A. No.

Q. Radio?

A. No.

Q. Here is a quotation I want to ask you a question about Mr. Shockey: "There are many articles made of sheet metal that are capable of standardization and are manufactured by large factories on a production basis and distributed to the public in the wholesale and retail channels". The first thing that I want to ask you is, do you agree with it?

A. Well, yes. There is many items that are manufactured, yes, that is the reason we are a little shop.

Q. Sir?

A. That is the reason we are a small custom shop. We can't compete with a manufacturer.

Q. You have been in the business for quite a few years, have you not?

A. Yes.

Q. Will you name some of the "many articles made and distributed" in that way?

A. Washing machines, and refrigerators, and wash tubs, and stock tanks, and sheep troughs, and you could think of a lot of them—a lot of different things—automobiles.

[fol. 48] Q. Do you sell any of these articles?

A. No, sir—when you say any, I have to retract, occasionally we build a sheep tank for a farmer that wants to water sheep in it.

Q. That is minor?

A. Yes.

Q. Just a little bit of your business?

A. Yes.

Q. How many sales clerks do you employ at the Idaho Sheet Metal Works?

A. None.

Q. I believe that you mentioned a moment ago that you never fabricated for stock as opposed to special orders?

A. I didn't hear you.

Q. Do you ever fabricate articles for stock as opposed to fulfilling a special order?

A. No, we don't stock any merchandise at all except the flat sheets and conductors and gutters.

Q. Mr. Shockey, in answering an interrogatory that the plaintiff served on you last May, in June you answered by saying this—this is Mr. Weston, this is Number 19. You said: "This store has a retail store license issued by the State of Idaho". Now, first, I want to ask you whether you [fol. 49] ever at any time prior to the commencement of this litigation actually thought of your Burley establishment as being a store?

A. Well, we have to have a store license to operate.

Q. That is not what I asked you, sir. Will you read the question?

(The Reporter read the question as it appears on page 48, line 20.)

A. We are a retail sheet metal shop. We have to have—I was wrong when I made the statement if I made the statement that we had a retail store license—we have a state store license, it doesn't say whether its a retail store license or what it is—its a store license—it doesn't specify that it is retail.

Q. What I want to know, before the law suit started, did you personally ever think about this establishment at Burley as being a store?

A. Absolutely.

Mr. Weston: I'm not sure that the witness knows what is meant by a "store". He says that he felt they were a retail establishment. I don't know what is meant by a "store" either.

The Court: The answer may stand, he has answered the question.

[fol. 50] By Mr. Leist:

Q. You say you did?

A. Pardon?

Q. You thought of this place as a store?

A. As a retail sheet metal shop where you cannot buy anything that is prefabricated. Every job we do is to the customer's specific recommendations and to his personal use. We do not stock any merchandise that is prefabricated that you can pick up from a counter but a few pieces of gutter and down spout.

Q. You don't have a counter, do you?

A. Its a matter of interpretation. We have six counters, work benches, and they serve as counters as a customer comes in, about the same as if you came into a store and a clerk got out a bolt of cloth, we get out a piece of sheet metal and put it on the counter or work bench and fabricate it to what the customer would like to have to meet his specifications.

Q. You have nothing manufactured?

A. No, we are not a manufacturing outlet.

Q. You have nothing to fabricate?

A. We don't manufacture anything. We do manufacture stuff in the Idaho Sheet Metal Company in Boise but not in Burley.

Q. I still don't believe you have answered the question as [fol. 51] to whether you personally ever thought of this establishment as being a store before the law suit began.

A. All of my life I have recognized our business as a retail business.

Q. I am not asking you that. I am asking if you thought of the establishment as being a store before the law suit started.

Mr. Weston: I am confused, and I imagine the witness is. I don't know what he means by a store. He has testified as to what he runs and what he thought it was. I don't believe its relevant here; I believe the Court wants the facts and the Court will determine whether its a store.

The Court: You asked him what he thought it was and he told you. The objection will be sustained. The question is repetitious. I don't know what you mean by a store either, there are various and sundry stores. He has told you what he considered his business to be and that is an answer to your question as far as the Court is concerned.

By Mr. Leist:

Q. Well, may I ask you this, Mr. Shockey: who named this business?

A. I did.

[fol. 52] Q. Why did you put in there the word "Works" instead of "store"?

Mr. Weston: If the Court please—

Mr. Leist: Let him answer.

The Court: Mr. Leist, Mr. Weston has the right to make an objection, he is on the other side of the law suit.

Mr. Weston: We are getting into the matter of conjecture and speculation as to why he put the name into the corporation. I think that the Court can take judicial notice where he got the name. We have all sorts of fanciful ideas. I can't see why he should not use the word "store" in place of "works".

Mr. Leist: If I may—

The Court: Just a minute. If he knows why he used the word "works", he may answer the question.

The Witness: We have one that is the Idaho Sheet Metal Company, and when we formed the other we figured we would call it the "works". I couldn't call both of them "company"—I wanted it different.

By Mr. Leist:

Q. Why didn't you call it the "Idaho Sheet Metal Store"?

A. Why do they call it the Hotel Boise? I don't know.

[fol. 53] Q. What do you think of a company that would be the "Albertson Food Works"?

Mr. Weston: I am going to object, it is improper and argumentative.

The Court: Objection sustained. He answered the question.

Q. Mr. Shockey, do you regard the Idaho Sheet Metal Works, Incorporated, as a service establishment?

A. Well, I don't understand what your interpretation of a service establishment is. Maybe.

Q. You don't know what a service establishment is?

A. I don't know what your terms of it is, I know what mine are.

Q. Well, would you care to answer the question any farther?

A. Well, a place where people can come and order something and which can be fabricated for them, that is what we call—that is what we would term service to an individual, and if he could go to the Salt Lake Hardware he could go and buy it, but it is custom built and not manufactured by a manufacturer. There is two separate categories in the manufacturing; one is a retail custom shop that supplies the piece to the individual that is not manu-[fol. 54] factured for public use; that is our category. We are a retail custom building shop.

Q. Do you regard the defendant as a service establishment?

A. I don't know whether to answer the question or not.

Q. It seems that the answer is "yes" or "no"; can't you answer it that way, one way or the other? You do or do not regard the defendant as a service establishment?

A. Well, it is, yes.

Q. Thank you. Mr. Shockey, you were here when Mr. Carrier testified?

A. Yes.

Q. I asked him a question that he could not answer. I am going to ask you the same question. Insofar as the type of equipment which the defendant has fabricated for Shelley and J. R. Simplot and the other big potato processors in the Burley and Heyburn area, would it be fair to say that the market for this type of equipment is limited?

A. Definitely. Its all custom built stuff to fit in each individual case.

* * * * * * *

[fol. 57] Cross examination.

By Mr. Weston:

* * * * * * *

[fol. 58] Q. How long have you been in this particular occupation or work of processing and selling tin or sheet metal products?

A. Approximately thirty-nine years.

Q. Did you operate a shop in Boise at one time?

A. No.

Q. Where did you first operate your shop?

A. Well, yes, the first shop is in Boise.

Q. Is that what is called a tin shop?

A. That's right.

Q. And what you are operating now, is that a tin shop?

A. That is the term we have always used.

Q. In describing the machines, is that the standard equipment for a tin shop?

A. Yes.

Q. The machine that is fifty years old, is that what was used fifty years ago in a tin shop?

A. That is right.

Q. Is there any other place in the industry where the [fol. 59] general public or an individual can go in and purchase a product such as you make, other than your type of establishment?

A. No.

Q. And the articles that have been described as being manufactured, where are they sold?

A. Warehouses and wholesalers, and in hardware stores.

Q. You do not manufacture that type of product?

A. No. Lumber yards and—

Q. Do you charge a retail price for the items?

A. Yes, sir.

Mr. Leist: Your Honor, I object to that. Who knows what a retail price is?

Mr. Weston: I will withdraw the question.

The Court: Do you want to withdraw the answer too?
Mr. Weston: Yes, both.

* * * * * * *

[fol. 60] By Mr. Weston:

Q. In case you fabricate or change the sheet of metal into something for a customer, how do you figure the price on that?

A. What it cost and the percentage of profit, and the cost of labor, and the operating costs.

Q. Is that a standard price to everyone?

A. That's right.

* * * * * * *

[fol. 62] Redirect examination.

By Mr. Leist:

Q. Mr. Shockey, you have just testified in response to one of Mr. Weston's questions that these items that you fabricate at Burley are sold at a standard price to every-
[fol. 63] one; that was your exact wording, a standard price to everyone.

A. I want to hear that again.

Q. You have just testified in response to one of Mr. Weston's questions, and in reference to the articles that you fabricate at Burley, that they are sold at a, quote, standard price, to everybody. Actually, I am not through with the question. First, I want to ask you, are you including in that the potato processing equipment which you make and sell to Shelley and J. R. Simplot and Idaho Potato Processors?

A. Yes.

Q. Who is everyone?

A. Everyone we deal with.

Q. Are they all potato processors?

A. No.

Q. For this type of equipment, hoods and vats?

A. No.

Q. Who else do you sell to?

A. Amalgamated Sugar Company, and with creameries, and farmers, and we do business with restaurants—in fact, we do quite a bit of restaurant work at times.

Q. Mr. Shockey, to whom would you sell a receiving tank, the capacity of which is 5,000 pounds of potatoes, other than a potato processing company?

[fol. 64] A. Its possible we might sell it to the Amalgamated Sugar Company if they desired one and asked us to build it.

* * * * * * *

Recross examination.

By Mr. Weston:

Q. Would you say that your establishment in Burley was set up to serve the general public?

A. Yes, in fact we put the plant in there, our sheet metal shop in there, before all of the processing plants came there.

[fol. 65] Q. In point of number of sales and services, do you have more to the general public?

A. Yes, its approximately sixty per cent to the general public and forty per cent to the customers.

Q. I am talking of the number.

A. Yes, sixty per cent to the public and forty per cent to the processors.

Mr. Weston: That is all.

Mr. Leist: I have no other questions to ask Mr. Shockey.

* * * * * * *

[fol. 67] Virgil P. Coffin a witness called on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record.

The Witness: Virgil P. Coffin.

[fol. 68] Direct examination.

By Mr. Weston:

Q. Will you state your name, residence, and profession?

A. V. P. Coffin, Boise, Idaho; I am a lawyer.

Q. Are you connected with the defendant in this case?

A. As an independent contractor, yes. I take care of their accounting and internal auditing and their tax and legal matters.

Q. How long have you been connected with this company?

A. From the time that it started, which was January 1, 1957.

Q. Prior to that time were you in any way connected with the Boise operation?

A. Yes.

Q. What is the name of that corporation?

A. Idaho Sheet Metal Company.

Q. How long were you connected with them?

A. Beginning on June 1, 1945.

Q. Did you have any connection with the industry encompassing tin shops and metal shops before that?

A. Yes, I did. When I was thirteen, fourteen and fifteen years old, my father and uncle had a retail hardware store [fol. 69] here in Boise. During the summer school vacation I worked in the store and in the basement was a tin shop. That tin shop was an intriguing institution to me and I got down to see what was going on and learn what I could from the tinner. This was operated in the same way that the sheet metal shops are today. It was smaller—the people would come in—it was custom—and they ordered stove pipes or tanks and the tinner would make it up for them on the specifications.

Q. Are you familiar with the operation of the tin shops or the metal shops as they may be called now?

A. Yes.

Q. Will you tell us whether they are considered as a retail establishment or not?

A. Yes, they are considered retail establishments, the reason being that the entire custom sheet metal industry is a retail industry.

Mr. Leist: Excuse me, Mr. Weston. I would like to object, Your Honor. If I understand the purport, have you qualified him as an expert?

Mr. Weston: I think he is expert, yes.

Mr. Leist: On the basis of working in his uncle's tin shop when he was thirteen or fourteen years old?

The Court: He has answered the question.

[fol. 70] Mr. Leist: I move that the answer be stricken; that he is not an expert or he has not been—

The Court: The answer may be stricken for the purpose of the objection. What is it?

Mr. Leist: While Mr. Coffin may be an expert, he is not qualified as one on this record.

Mr. Weston: If the Court please—have you ruled?

The Court: No. You better lay a little more foundation. I will sustain the objection at this point.

Mr. Weston: I appreciate the general rule, however, in this type of case, which is peculiar, you will recall in the testimony from Mr. Leist's questioning, he asked everyone whether it was a retail store or what it was. Under the law—

The Court: I understand.

Mr. Weston: —anyone in the industry can testify what they consider it and he is in the industry.

The Court: Has he testified that he has been in the industry ever since the sheet metal works was founded?

Mr. Weston: Yes.

The Court: The one in Boise?

Mr. Weston: Yes.

[fol. 71] The Court: Find out what his connection was as far as finding out what the industry is.

By Mr. Weston:

Q. Are you familiar with the sales in the industry by the manufacturers; are you familiar with that?

A. To this extent: I am familiar with the type of transactions.

Q. Are you familiar with the transactions in the wholesale division of the industry?

A. No.

Mr. Leist: Your Honor, Mr. Weston, I am not trying--I want to point out—what industry?

Mr. Weston: Sheet metal and tin.

Mr. Leist: Sheet metal and tin industry?

The Court: Go ahead.

By Mr. Weston:

Q. Are you familiar with the evolution or the change from the old tin shop to the present shop which you have described?

A. Here in southern Idaho, yes.

Q. Describe that for us, briefly.

A. These early tin shops, back at the turn of the Century —1900—and two or three years before and after that date were strictly custom institutions and all of them that I knew about in southern Idaho were located in retail [fol. 72] hardware stores and they did a retail business for the customers that came in with the specifications for the job they wanted. Since that date large factories that turn out goods on a production basis have taken over a considerable portion of the products that the tin shops made, but the factories have left unsupplied a field of articles that are not standard or capable of being manufactured on an economical basis, and that hiatus in the sheet metal production is what has made possible the building up and the existence of the custom sheet metal shops today. They use the same type of machinery—sometimes larger—and the men are called tinners and always have been, and they produce articles that the factories don't make and you can't buy them anywhere else, you have to go to one of the little shops to get them made, and in that respect they are the same as the tin shops of sixty or seventy years ago.

Q. Did I understand you to say that traditionally these shops were in the hardware stores?

A. Yes.

Q. But they have broken away and they are on their own, and the hardware store is on its own?

A. Yes.

Q. With that background, are you familiar with the—let [fol. 73] me put it this way: Do you know, from your own experience and knowledge, how these shops that you have described are considered in the industry with reference to being retail?

A. Only as a matter of my own opinion.

Q. What is that opinion?

A. That they are custom retail and service establishments.

Mr. Leist: Your Honor, I object again on the ground that Mr. Coffin who is a very fine lawyer is not an expert.

The Court: Objection overruled. He is stating his opinion for what it is worth and based on his background.

* * * * * * *

[fol. 74] Cross examination.

By Mr. Leist:

Q. Mr. Coffin, do I understand you to say that you equated the business done by this defendant as that done by the tin shop that was in your uncle's basement that you worked in when you were a boy?

A. I consider the business that is done in companies as by the defendant today as the outgrowth and development of the early day tin shop, and in a great extent it is the same kind of tin shop doing the same kind of work for the same kind of people.

Q. The same kind of work?

A. Yes.

Q. For the same kind of people?

A. Yes.

Q. As in your uncle's basement, is that right?

[fol. 75] A. Yes.

Q. Are there any significant differences between the defendant's operation and those?

A. There are marked differences in that it involves this type of business is immensely larger than it was sixty years ago, the type of product they turn out due to the fact they utilize sheet metal of types that was not in existence sixty years ago, and since they can use that type of material they can do jobs that the early tin shops could not do. This record here shows the production of articles larger in size and much higher in price, but the customers of the two institutions have not changed, its still just the general public that comes in with individual specifications for a particular job. To that extent they have not changed a bit.

Q. You remember about the tin shop in the basement of the hardware store?

A. Oh, yes.

Q. To your recollection was there any year when that tin shop did 79 to 86 per cent of its dollar volume of business with only five customers?

A. I wouldn't know the answer to that question. I had nothing to do with the dollar volume. I was a small boy and my father was a part owner and I was sneaking away to go and watch the tinner. I saw the customers come in, [fol. 76] I knew them, and they were people around town with a specification of something they wanted made. That I did know.

Q. Did you know whether the general manager of one of the largest potato processing companies in the United States came in and asked to have a 5,000 pound stainless steel tank made?

A. Specifically, I don't know, but I don't think he did. There were no potato plants in existence in those days.

Mr. Leist: I have no further question.

* * * * * * *

CLIFFORD P. JACKSON a witness called on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record.
The Witness: Clifford P. Jackson.

[fol. 77] Direct examination.

By Mr. Weston:

* * * * * * *

[fol. 78] Q. You serve the general public, beside the processors?

A. Yes, we do.

Q. Just give us a few of the types of customers that you serve in the general public.

A. We do a considerable amount of work for the farming people, and quite a bit for the Cassia County and the Minidoka County schools, and we do work for the dairy industry, we do work for the box industry or the container [fol. 79] industry, we do work for just the man down the street who wants a rain pipe or gutter.

Q. Farmers?

A. Yes, and any one that requires a custom sheet metal job.

Q. Do you have a stock of materials on hand that you sell to the general public?

A. Yes, we do.

Q. Is that about the same stock that Mr. Shockey described?

A. Yes, it is.

Q. Can you add anything to his statement on that?

A. Only that our stock includes several different types of materials—steel, aluminum, stainless steel, copper, and sheet metal sheets of all sizes and shapes.

Q. If I were to come into your shop to buy a piece of sheet metal, you would have it displayed that I could look at it?

A. Yes, sir.

Q. And would you cut it to my specifications?

A. Yes.

Q. And when you sell it to me, how do you figure the price?

A. I have a price book which gives me the price of the [fol. 80] material per pound or per square foot, or per sheet, whichever category you would fall in I would price it to you.

Q. Where do you purchase the sheet metal?

A. From a wholesale sheet metal supplier.

Q. And do you pay what you term a wholesale price for that?

A. That's right.

Q. And when you sell it to me you charge a retail price?

A. That is right.

Q. And is that a standard to everybody?

A. That is correct.

Q. Do you know what your establishment is considered in the industry as to being a retail establishment?

A. Yes, it is.

Q. Do you consider it a retail establishment?

A. Yes, I do.

* * * * * * *

[fol. 84] By Mr. Weston:

Q. A little further description of the establishment as to [fol. 85] its accessibility to the public.

A. You mean the product?

Q. No, the building.

A. We have a large sign that is four feet by ten feet on the highway that directs the public into our establishment. Its approximately two- or three-hundred feet off the highway behind a car lot and its identified and accessible to the public.

Q. The front door, is it big or small?

A. Its a four foot door.

Q. Is that a door—is there a door that you can drive a truck in?

A. Yes.

* * * * * * *

[fol. 88] LYNN A. LAKE a witness called on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record.

The Witness: Lynn A. Lake.

Direct examination.

By Mr. Weston:

Q. Will you state your residence and occupation?

A. Borah Avenue West, Twin Falls, Idaho. I am branch manager and I represent the Structural Steel and Forge Company in the Twin Falls area.

Q. How long have you been engaged in your present occupation?

[fol. 89] A. Since 1951.

* * * * * * *

Q. Do you sell metal products to the defendant in this case?

A. Yes.

* * * * * * *

Q. Do you know whether or not plants like the defendant's are considered retail within the industry?

* * * * * * *

The Witness: Yes, they are.

* * * * * * *

[fol. 90] The Court: Objection overruled, he may answer.

* * * * * * *

The Witness: Yes, they are.

* * * * * * *

[fol. 91] RODERICK LAW a witness called on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record.
The Witness: Roderick Law.

Direct examination.

By Mr. Weston:

Q. Will you give us your residence and occupation?
A. 1865 Southwest Highway, Portland; salesman for the Alaska Copper and Brass Company.

* * * * * * *

Q. Do you sell products to the defendant?
A. Yes, sir.

* * * * * * *

[fol. 93] By Mr. Leist:

Q. Mr. Law, are you in that industry which takes sheet metal in its sheet form and uses the various machines to bend it into various shapes?
A. Yes, sir.
Q. You are in that industry?
A. Yes, sir, I sell pipe and fittings which are made by our shop in Seattle.

* * * * * * *

[fol. 94] Q. Do you know whether or not the defendant in this case is considered a retailer in the sheet metal industry?

The Court: You may answer "yes" or "no".
The Witness: Yes.

[fol. 95] Q. And is it considered a retail establishment?
A. We do, yes.

* * * * * * *

Cross examination.

By Mr. Leist:

Q. You do the same thing that the defendant in the case does?

A. No, its far beyond his capacity and we do production line work up there.

* * * * * * *

[fol. 97] HARRISON L. GRATHWOHL a witness called in rebuttal by the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record.
The Witness: Harrison L. Grathwohl.

Direct examination.

By Mr. Leist:

Q. Mr. Grathwohl, where do you live?
[fol. 98] A. Seattle.
Q. What is your occupation?
A. I am associate professor of Marketing at the University of Washington.
Q. You have a degree?
A. Yes, Doctor.
Q. What does the Doctor stand for in your name?
A. Doctor of Business Administration.
Q. You have a specialty?
A. Yes, Marketing.
Q. Pardon?
A. Marketing as a broad field.
Q. I will ask you, sir, in the interest of saving time, if you will qualify yourself in the field so far as your education and experience in the field of marketing.
A. I received my Bachelors and Masters and Doctorate at Indiana University. I taught at Indiana University and assisted in a consulting firm and taught at Indiana State University and went to South Dakota where I was associate

professor, and then I came out to the University of Washington four years ago.

Q. And you have been constantly employed there in the [fol. 99] School of Business Administration?

A. Yes, and I have consulted for a number of firms throughout the country in industries and as diverse as trading stamps and building bricks, in advertising, and in retailing and wholesaling. I have written several monographs and books on the subject of marketing in the area of retail sales promotions, and I have a number of articles in trade publications on the subject of marketing—on a variety of subjects.

Q. How do you happen to be here?

A. I was asked by you, Mr. Leist, to appear in this Courtroom for a fee and to give my opinion on the status of the defendant in this case.

Mr. Leist: I present Doctor Grathwohl as an expert.

The Court: We will hear the questions then determine whether he may answer them or not.

By Mr. Leist:

Q. Doctor, at our first meeting several days ago, I gave you a copy of a pre-trial order which has been entered in the case. I asked you to read it, paying particular attention to Paragraph 5, the Agreed Facts, and also Paragraph 6, which states the issues of fact. Now, have you read that pre-trial order and the particular parts of it?

[fol. 100] A. Yes, I have read it carefully and I have studied it.

Q. Now, I will ask you if you have been present in the courtroom throughout the proceedings of this trial since it began at 1:30 this afternoon?

A. Yes, I have.

Q. And you have heard the testimony of Mr. Carrier, did you hear his testimony?

A. Yes, I have.

Q. And you heard the testimony of the defendants' witnesses?

A. Yes, I have.

Q. Now, Doctor, based on the facts stated in Paragraph 5 of the pre-trial order and as amplified and explained by the testimony of Mr. Carrier, I will ask you whether you have formed an opinion as to whether the sales which the defendant, the Idaho Sheet Metal Works, Inc., made to the Shelley Processing Company of the J. R. Simplot Company in 1959, and 1960 and 1961 were recognized as retail sales or services in the sheet metal fabricating industry?

Mr. Weston: This calls for a "yes" or "no" answer.

Mr. Leist: It calls for an "I have" or "have not".

[fol. 101] The Witness: I have.

By Mr. Leist:

Q. What is that opinion?

Mr. Weston: I object, if the Court please. We base the objection on the fact that this well educated Doctor has not qualified as an expert in this particular industry, to wit: the sheet metal industry. The rule, which I was about to find is that, it is true, they can use experts but in my opinion that refers to the industry which is in issue in this case. This man has testified that he has had experience in teaching and study, and he has written books, and has experience in the trading stamps business, and one other but he is not qualified as to what is considered a retail establishment in this industry. We object, it would be misleading.

The Court: He did not answer the question. He asked whether the sales were retail sales; he didn't ask if it was a retail establishment, I believe that is the question. He said he has an opinion and he may answer. It goes to the weight of the testimony.

The Witness: What is the question?

The Court: What is your opinion?

The Witness: My opinion is that they were not retail sales.

[fol. 102] By Mr. Leist:

Q. Now, Doctor, I will ask you to go one step further and tell us what the basis of that opinion is.

A. Well, first of all, I would like to say that the tests that have to be applied are general in nature and I think that the examination of the particular situation, we have to recognize that other activities of the firm may be retail in nature but in relation to the J. R. Simplot and the Shelley Processing Company, these, in my opinion were non-retail sales and this is based on a variety of tests. One of the primary tests that is commonly used in evaluating whether a sale is retail or some other is the quantity. When a sale is made in a very large quantity or when the particular buyer consumes large amounts beyond that which would be considered as a retail type of purchase, then the quantity rule commonly used would indicate that the sale is wholesale or non-retail. The quantity, in terms of quantities or to an individual buyer is a test. This would be that the Idaho Sheet Metal Works was making a non-retail sale in this case.

The type of customer is another test. This is differentiated by the use that the customer will use the product and the type of customer, that is, sales to restaurants, bars, hotels, other retailers, or sales to manufacturers in large [fol. 103] amount or sales of building materials to customers for the construction of manufacturing or fabricating plants. They are considered non-retail sales. The buyers, from a retail establishment are generally not other businesses.

The production of goods to prior plan and specification can sometimes be used—its not a stock test. I think probably the prior specification would be more common in the manufacturing industry, manufacturers would do it more commonly for the specification order.

Credit systems—how was the sale made—what were the credit arrangements? From the testimony it was rather difficult to come out with anything that was outstanding in evaluating, except that it is fairly common in the manufacturing industries, for the commercial type of building where you have payments over time, that is at certain times—that is periodic—

Mr. Weston: Doctor, I don't know how that has anything to do with the industry. I am going to object. I don't think that it is relevant of what happened in another industry. We are pressed for time and I wanted to cross-examine.

The Court: He was trying to explain how he arrived at the conclusion. I don't like to stop him. You may continue. [fol. 104] The Witness: Price is another method of evaluating, and the fact that there is a price differentation would be a case there is a non-retail type of sale. However, the fact that a seller offers the same price to all buyers does not necessarily indicate that the sale is a retail sale. The test can be used only to distinguish a wholesaler or manufacturer not a retailer per se.

They were the tests and in almost every case where there was a method of arriving at a conclusion, the conclusion had to be that the sales were not retail sales.

By Mr. Leist:

Q. Doctor, let me ask you this: as you know, the equipment which the defendant made for Shelley and J. R. Simplot was intended for a so-called business use or business purpose; that is, Shelley and Simplot intended to use it to make goods which they would sell at a profit. What part, if any, would this play in formulating the opinion that you just gave?

A. It was a factor but not a decisive factor. I don't think you would find an authority in the field of marketing that would disregard the test, and this was one of the several that I used.

Q. I have one further question. Again, based on the facts [fol. 105] stated in Paragraph 5 of the pre-trial order as amplified by the testimony of Mr. Carrier, I would appreciate it, would you say if you have formed an opinion as to whether the establishment that the defendant operated in Burley, Idaho, is recognized as a retail establishment in the sheet metal fabricating industry.

A. I have.

Q. What is that opinion?

A. It is definitely not a retail establishment.

Q. What is the basis—

Mr. Weston: Its repetitious. He has answered this—withdraw the objection.

The Witness: Should I answer?

The Court: Yes, you may.

The Witness: Again, I think there is no question that a certain portion of the sales made by the establishment would be classified as retail sales. However, in attempting to arrive at a conclusion of whether the establishment was retail or something else. The general rule is what is the predominant activity—is it retail or some other type of operation, so that this has to be again the criterion. We can look at the traditional concept of retailing which would take us back to the corner drug store or bakery. We think of [fol. 106] the over the counter sales which represent the predominant sales, or the door-to-door or mail order, but this does not appear to be the type of business that the establishment is in. Its not traditional. This is one test.

The other is the utility created. That is, what utility does the firm create? A retail establishment creates time, place and position utility. Manufacturing establishments are noted for the recreation of form utility. That is the prime consideration we have to make. Where the retailers recreate a form utility, as in the case of a bakery, it is secondary or incidental to selling. Retailers are noted primarily for buying and selling. Manufacturers exist for the purpose of giving a useful form. Applying the utility created, it seems that the firm is doing more in changing form and creating a form utility.

And the value added concept is another test. Sometimes that is used in conjunction with the cost of goods sold approach. In the case of a retailer it is valid, that is the additional value that is added to the product in passing through his hands from the time that he receives it as a raw material until he sells it—its the value added. In the case of a retailer, we have a relatively low value; in the case of a manu- [fol. 107] facturer, we have a rather higher value added,

that is, the retailer buys merchandise and he resells; the cost of goods sold subtracted from the selling price gives his margin. Take a super market, 20 per cent; or other types of retail added, the sales price is 30, or 35 to 40 per cent. In the manufacturing establishment we have much more in the way of input in the way of labor and machinery application so that he buys raw materials, the cost of goods sold, and that is a smaller portion of the selling price—it might be commonly under fifty per cent, whereas the retailer commonly has over fifty per cent on the cost of goods sold. When applying this test from the testimony, particularly, I believe they said that the amount of labor was the largest portion of the sale. This would indicate that it is a non-retailing operation, probably in the category of a manufacturer.

The distribution of sales, the concentration among customers is another test. Most of the retail establishments will have a sales pattern to many customers, not a concentration that is high, and in the case of this firm. According to my figures, in 1959 the Idaho Sheet Metal Works sold 67 per cent to one customer, and 75 per cent to five customers; and in 1960, 73 per cent went to two customers and 86 per [fol. 108] cent went to five. This is a concentration that is common in manufacturing—this is common in the larger industry manufacturing, not as common in the retailing industry.

The employees, another test, how are your employees distributed? Retailers are engaged more in buying and selling and manufacturers and others are engaged more in other activities. Looking at the firm and the information I was able to glean, it seems most of the employee force was to the fabrication or the production for the creation of a form utility from the product. Retailers generally have relatively high proportions of selling employees.

The place of business and the facilities is another test. The retailers business is for selling and not manufacturing, or producing, or other activity. This is common.

The credit system, over all, which is a test, I was not able to do anything with, is a system that might be employed to

see the difference that might occur in the retail versus the mercantile.

Another test which I consider good is the standard industrial classification code. This is arrived at by a variety of Governmental branches outside of the Department of Labor, as well as a group of industry representatives—[fol. 109] experts and informed sources in the general area—Dun and Bradstreet and known bureaus of research, and McGraw-Hill and trade associations. The purpose, then they set up the classifications is to conform to the existing structure of the industry and classify the firm or the operation according to the major activities. Now, the standard industry classification, as in the Idaho Industrial Directory in 1960 and 1961 for the firm, and this is the Idaho State Chamber of Commerce, using the census, listed the Idaho Sheet Metal Works as manufacturers, processors, etc.; and they gave the standard industrial code as 3444. This, the major grouping of 34 was for manufacturers, processors and manufacturing industries, and the secondary function was fabricated metal products and fabricated structural products, involving sheet metal work. They classified it as a manufacturing industry.

Mr. Weston: What the State Chamber of Commerce said is not relevant. Section—

The Court: If you are making an objection, it will be sustained.

Mr. Weston: The question is what are they considered in the industry, not what the State Chamber of Commerce says.

[fol. 110] The Witness: I was attempting the standard industrial classification which is an industry opinion because its classification—

The Court: How much longer is the testimony going to take? If it is going to take much longer we will recess until tomorrow morning. There is still cross-examination. You said that it would be about fifteen minutes.

Mr. Leist: Doctor, could you shorten it?

The Court: I don't want to shorten the value of his testimony.

The Witness: Well, there are several other tests which probably are not as significant as the ones I have applied here. I will conclude by saying that the general orientation of the firm does not seem to be one similar to retailing and it is not concerned with selling or display, or stock turnover—inventory turned over—which is common in retailing. This does not mean that all firms have to conform to the test. In all of the tests I have applied, it is that the predominant business is not retailing. Predominantly it is selling industrial goods to industrial buyers, and they are manufacturers.

Mr. Leist: That is all. I have no further questions.

[fol. 111] The Court: You may cross-examine.

Cross examination.

By Mr. Weston:

Q. Are you familiar, Doctor Grathwohl, I believe you have based most of your testimony on the reading of the pre-trial order; is that correct?

A. My opinion has been based on this, plus the testimony in court today.

Q. You did hear the testimony in the court today?

A. Yes.

Q. And did it alter your opinion from the reading of the pre-trial order?

A. No.

Q. Are you familiar with Section 13(a) of the law?

A. Yes.

Q. And that provides that a sale shall be considered retail—shall not be considered retail if it is for resale, and they rely upon the opinion of the industry with reference to whether it is retail or not; is that correct?

A. In the industry is the quotation. Yes.

Q. You heard the testimony of Mr. Law and Mr. Lake?

[fol. 112] A. I did.

Q. And of Mr. Coffin and Mr. Shockey?

A. I did.

Q. Coming to Mr. Coffin's where he stated that the establishments are evolutions or the transfiguration of old tin shop; did you hear that testimony?

A. I did.

Q. Did you agree with that?

A. I did. I suspect that the tin shop, however, was in the bottom of the hardware store. I would say that is different than we have today.

Q. Would you say that the old time tin shop was a retail establishment in the hardware store?

A. Yes, probably.

Q. What did they do in the form of changing the form of the metal and selling it to the public that the defendant does not do? I am not interested in size or the number of customers.

A. What did they do that the defendant does not do?

Q. That's right.

A. I would assume that they did not do very much that the defendant did not do.

Q. Would you say if I purchased a product as a custom [fol. 113] order, that would not be a retail purchase?

A. It depends on who you are.

Q. The general public.

A. It most probably would be a retail purchase.

Q. And you heard the testimony that all of the sales to the processors and the public are on the same standard; you heard that?

A. Yes.

Q. And in your opinion, the sales to the processors come in a different category than the sales to the public?

A. Yes.

Q. And the size?

A. Yes.

Q. And the use of the product?

A. That is one.

Q. Do you know that the Administration and the Courts have ruled that the size of the order nor the type of customer has no effect on the question of the retail establish-

ment if it is considered a retail establishment within the industry?

Mr. Leist: Objection, Your Honor, he is asking for a legal opinion.

The Court: Objection sustained.

[fol. 114] By Mr. Weston:

Q. Do you know that is a ruling by the Administrator?

A. I am familiar with the area, but I do not interpret it the same as you do.

Q. In the final analysis of 13(a), isn't it how its considered in the industry?

Mr. Leist: Objection, he is asking for a legal conclusion.

The Court: Objection sustained.

By Mr. Weston:

Q. You are not familiar with the metal trades industry?

A. Not in detail.

Q. You have never worked in it?

A. No.

Q. Would you say that the statement of Mr. Lake and Mr. Law were wrong?

Mr. Leist: Objection, Your Honor.

Mr. Weston: What is the objection?

Mr. Leist: He is asking him to assess the whole line of testimony.

Mr. Weston: No, I'm not.

The Court: Objection sustained, that is for the Court to determine.

[fol. 115] Mr. Weston: My point was, I wanted to know if he is setting himself up more of an authority than the people in the industry.

The Court: Apparently he is.

By Mr. Weston:

Q. Are you familiar with Section 13(a)(4)?

A. I am.

Q. And once the establishment has the attribute of a retail establishment, they will still qualify if all of the sales are within the State of Idaho?

A. Yes.

Q. And the plant can manufacture and have the retail—

A. Yes.

Q. And the fact that you think that the operation may do manufacturing, that would not deprive it of its right to a retail establishment?

Mr. Leist: Its subject to the same objection.

The Court: Objection sustained.

Mr. Weston: He gave his opinion.

The Court: Not as to the legal aspect; he gave an opinion as to what he thinks it is, what it is under the statute is for the Court.

Mr. Weston: I will go to the question of his actual knowledge.

[fol. 116] By Mr. Weston:

Q. Do you know that you can go to a lumber yard and order enough lumber to build your own home and have them cut it and sell it to you at retail?

A. Yes.

Q. And is the lumber yard considered retail under the law?

A. Yes.

Mr. Leist: Objection, Your Honor.

Mr. Weston: I am asking him if he knows.

The Court: He has answered the question.

By Mr. Weston:

Q. Let us assume that the J. R. Simplot Company should cease operations tomorrow, or for six months, and purchase nothing from the defendant—or any of the other processors; would you then say that the establishment would revert to a retail establishment?

Mr. Leist: Objection.

The Witness: No.
The Court: He may answer.
The Witness: No.

By Mr. Weston:

Q. You do not feel they have any of the attributes of a retail establishment?
[fol. 117] A. The questions are not the same. If Simplot were to go out of business, that would leave a total volume going to the particular area, and I stated that the firm does have some attributes of a retail operation, that it makes ten percent of the sales at retail.
Q. If all of the intra-state producers mentioned in the pre-trial order were to quit ordering from the defendant, then in your opinion, would they be a retail establishment?

Mr. Leist: Object, this is purely a hypothetical statement of fact which is not going to occur.
Mr. Weston: For the simple reason that he has testified that it is because of the customers that we have lost the status as a retail establishment.
The Court: He may answer.
Mr. Leist: Do you understand the question?

By Mr. Weston:

Q. The question is: if all of the inter-state purchasers, the processors and the sugar company, and so forth, were to quit patronizing this defendant, would it be your opinion that they would be a retail establishment under this law?
A. If the majority of the sales went to the small consumer, the general public, yes.
[fol. 118] Q. And the size of the sales has nothing to do with it as stated under the law?

Mr. Leist: Objection, Your Honor.
The Court: Objection sustained.

By Mr. Weston:

Q. If I were to buy fifteen Cadillac cars, would that be retail?

Mr. Leist: Objection, Your Honor, it—

Mr. Weston: He is an expert.

Mr. Leist: You are asking him to express an—

The Court: I am making the rulings in this Court. You make the objections and no arguments. He is testing the basis of the rule that he is using to arrive at the opinion which he has. I think he is entitled to do that. He may answer.

The Witness: If you bought fifteen Cadillac cars?

By Mr. Weston:

Q. Yes.

A. That would be a retail sale unless it were a fleet purchase, and then it would not be.

Q. On what do you base the last statement?

A. You would be consuming the cars, and as a fleet or commercial user of the cars, you would be buying in larger quantities and probably in certain types of credit, and there [fol. 119] are several other tests. I am trying to apply several tests to the hypothetical question.

Q. Did you in that fleet and quantity, the sales are still considered a retail sale?

Mr. Leist: Objection.

The Court: Mr. Weston, it is not within the province of this witness to answer what the law is. I must ask you to refrain from asking legal questions. The objection is sustained.

Mr. Weston: The reason I am doing it, most of his answers encompass the bulletin.

The Court: There is a way of asking the question.

By Mr. Weston:

Q. Doctor, did you know that the question of determining whether an establishment is a retail establishment or not encompasses sales and services?

A. Yes.

Q. So that under this Section 13(a)(2), a retail establishment can have both sales and/or services; is that your understanding?

A. Yes.

Q. When you mentioned the fact in one particular period they had more labor than sales of commodity, why did you [fol. 120] draw the distinction?

A. This is a general test. You may find an exception to any test, but when you apply a variety of general tests and all of them come on one side or the other, then you must reach the conclusion that the firm is retail or not retail.

Q. You know that the dry cleaning establishments that give services is a retail establishment?

A. Yes.

Q. Another is the garage?

A. Yes.

Mr. Weston: That is all.

OFFERS IN EVIDENCE

Mr. Leist: I have no further questions. If Your Honor will allow me to make an offer of two documents in evidence our case is complete.

The Court: I don't know what you are offering.

Mr. Leist: I am offering the telephone directory of Mountain States Telephone Company for Burley, among other cities, to show the listing of the defendant in the yellow pages. They have two listings.

Mr. Weston: We object, there is not foundation for introducing the exhibit.

Mr. Leist: This is a book that certainly is reliable.

Mr. Weston: My objection goes to the question of who [fol. 121] put it in there and what was the purpose of

putting it in there. I think there should be a foundation laid.

Mr. Leist: May I ask if Mr. Weston suggests that the listing was put in for an ulterior purpose with the case in mind.

Mr. Weston: Did the manager, or one of the office girls, or Mr. Simplot; is that one of the ordinary types of advertising.

The Court: Let's do it in an orderly fashion, please. Have it marked and offer it and we will hear the objections.

The Clerk: Marked as Plaintiff's Exhibit No. 1 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 1 for identification.)

Mr. Leist: I would call Mr. Shockey back to the stand.

The Court: Are you offering Plaintiff's Exhibit No. 1 in evidence?

Mr. Leist: Yes.

The Court: What is the objection?

Mr. Weston: There is no foundation.

The Court: Objection sustained.

Mr. Leist: May I call Mr. Shockey?

[fol. 122] The Court: Yes, you may.

Herbert J. Shockey a witness having previously testified in this cause, having been first duly sworn, was recalled for further examination, and testified as follows:

Direct examination.

By Mr. Leist:

Q. Mr. Shockey, I hand you Plaintiff's Exhibit No. 1 for identification and ask you to look at page 67 at which point there is a listing for the Idaho Sheet Metal Works in Burley; did you have anything to do with inserting that listing in this book?

A. Yes.

Q. You did?

A. Yes.

Q. Did you compose the copy there?

A. I don't know that I did the words exactly like this, but this was the general idea, to convey to people this idea, yes.

Q. I will ask you to look at one other listing on page 31 where the Idaho Sheet Metal Works is listed; did you know that was inserted in there?

A. I didn't know this was, no, but I know of the other one.

[fol. 123] Q. Is there anything incorrect about the listing on page 31?

A. No.

Q. This one?

A. Except—this one?

Q. That's right.

A. Well, it all depends on how you interpret it.

Q. Is there anything incorrect about it; tell us what it is.

A. We have confessed up today, or admitted in Court we build certain types of equipment, but not the important part of the line in the Burley shop.

Q. Is it a correct or incorrect listing?

A. This is correct.

Mr. Leist: I reoffer it.

The Witness: Everything has to be negotiated with the consumer.

Mr. Leist: I renew the offer of Plaintiff's Exhibit No. 1 for identification.

The Court: What is the purpose of this exhibit?

Mr. Leist: I want to show how they are listed.

The Court: What is the purpose?

[fol. 124] Mr. Leist: Whether it is manufacturing or what.

The Witness: Its to show—

The Court: You are not testifying now. Do you have an objection?

Mr. Weston: May I look at it?

The Court: Yes, its being offered to show how they are listed in the telephone directory. Is there any objection?

Mr. Weston: I don't think there is any objection.
The Court: It may be admitted for that purpose only.

(The document referred to was marked Plaintiff's Exhibit No. 1 and was received in evidence.)

Mr. Leist: I have one further offer.
The Clerk: Marked as Plaintiff's Exhibit No. 2 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 2 for identification.)

Mr. Leist: This, Your Honor, is the Idaho Industrial Directory, 1960-61 Edition, published by the Idaho State Chamber of Commerce.
The Court: Are you testifying?
[fol. 125] Mr. Leist: I am reading the document, sir. It purports to be a standard publication of this organization.
The Court: Are you offering Exhibit No. 2?
Mr. Leist: I am.
Mr. Weston: Object on the ground there is no foundation.
The Court: Objection sustained.
Mr. Leist: I have no method of qualifying that, sir. I rest.
The Court: If you did, it would not prove or disprove any issue in this case.
Mr. Leist: It has the standard industrial classification.
The Court: That is no test.
Mr. Leist: This is not the Chamber of Commerce, it is the United States Department of the Census.
The Court: What they classify them does not prove a thing.
Mr. Leist: I rest.
Mr. Weston: Nothing further, Your Honor.
The Court: The court will take the matter under advisement.

[fol. 126] Reporter's Certificate to foregoing transcript (omitted in printing).

Floor Materials & Laying

BROWN FLOOR COVERINGS
See our ad under Carpet & Rug Dealers—New
1235 Oakley Av ---------- 678-8127

MARTELS—
McCASLIN LUMBER CO
1105 Overland Av 678-2211

TILE-TEX FLOORING PRODUCTS

"First Family in Floors"
Flexachrome—vinyl-asbestos
Holiday—asphalt & vinyl-asbestos
Medley—random plank design
Tile-Tex—asphalt floor tile
Tuff-Tex—industrial
Adhesives and Accessories

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McCASLIN LUMBER CO
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HEIDER FLOOR SERVICE
341 6 Av E Twin Falls Long Distance-733-3981

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BURLEY FLORAL & GIFT
FLOWERS FOR ALL OCCASIONS
Member Florists' Telegraph Delivery Assn
— Delivery Service —
1229 Oakley Av ---------- 678-7322

ELAINE'S FLORIST'S 1218 Overland Av - 678-5622
If no ans call -- ---------- 678-8157
If no ans call ---------- 678-2403

Flour Mills

BURLEY FLOUR MILLS 1039 Overland Av 678-5578

Food Processing

California Packing Corp 323 23 Dr ---- 678-8044

IDAHO POTATO PROCESSORS INC
2½ Miles West on Hiway 30
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Employment Office 240 W Hwy 30 678-8330

ORE-IDA FOODS INC
See ad under Frozen Foods
280 W Hwy 30 ---------- 678-8327
Farms Division Office ---------- 678-5371

SIMPLOT J R CO Heyburn ---------- 678-2271
Simplot J R Co Unity ---------- 678-8710

Food Processing Equipment & Supplies

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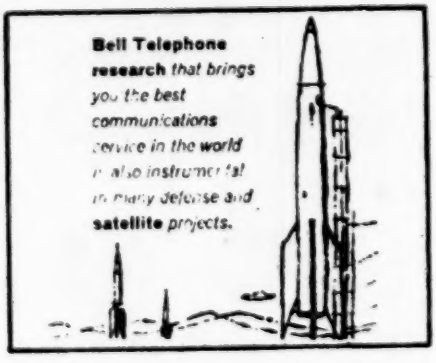
SIMPLOT J R CO Heyburn ---------- 678-2271

Fruits

Y-Dell Fruit Basket 80 E Hwy 30 ---- 678-2444



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
SOUTHERN DIVISION

PLAINTIFF'S EXHIBIT No. 1

Sewing Machines—Household

SINGER SEWING MACHINES

EXPERT SEWING MACHINE REPAIRS. SINGER Sales & Rentals; Parts and Service. Put all your sewing needs—Look for the Famous "SINGER" and Red "S" Trademarks.

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Sewing Machines—Household —Repairing

White Sewing Machine Service
1332 Albion Av- 678-8092
(See Advertisement This Page)

Sewing Machines—Parts & Supplies

White Sewing Machine Service
1332 Albion Av--678-8092

Hobby—Electric

SINGER SEWING CENTER SERVICE—
CRAFTS & HOBBIES
1251 Overland Av- 678-7512

Hooks

Cal-Am Stamp Co 210 S 600 W Paul --- 678-8725

Sheet Metal Work

Castle Sheet Metal 750 Overland Av ----678-7701
(See Advertisement This Page)

RAMEY SHEET METAL WORKS
GENERAL SHEET METAL
STAINLESS STEEL
BAR FIXTURES · DUST COLLECTORS
RESTAURANT FIXTURES
— SMOKESTACKS —
2197 E Main ----------678-7342

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See Steel Distributors & Warehouses

Carry Color Samples

When a wall is painted, have the painter paint the color on a small piece of board. Then take this with you when you look at draperies, furniture, rugs, pictures, etc., for that room.

Sheriff

Sheriff's Office
Burley County B ----------678-2131
Declo ----------678-2131
Oakley --------Long Distance-Burley-678-2131

Shoes

Alexander the Clothier 1238 Overland Av-678-5381

DAYLEY'S SHOE STORE
Corrective Shoes for Children
1232 Overland Av ----------678-5638

HUDSON'S SHOE STORE
Headquarters for
• BUSTER BROWN CHILDREN'S SHOES
• MEDIC CORRECTIVE SHOES
1237 Overland Av ----------678-7531

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CASTLE

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Phone 678-7701
750 OVERLAND AVE. - BURLEY

[fol 128]

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[fol. 129]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

No. 3745

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff,

vs.

IDAHO SHEET METAL WORKS, INC., a corporation, Defendant.

No. 3752

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff,

vs.

IDAHO SHEET METAL WORKS, INC., a corporation, Defendant.

MEMORANDUM OPINION—March 7, 1963

The Secretary of Labor has brought these actions against Idaho Sheet Metal Works, Inc., for alleged violation of the Fair Labor Standards Act, 29 U.S.C. §201 et seq. By Case No. 3745 the Secretary seeks to enjoin the corporation from violating the overtime provisions of the Act. By Case No. 3752 he seeks to recover unpaid overtime compensation allegedly due a former employee of the firm.

In Case No. 3752 the amount involved is not in dispute, and the issues of law are the same in each suit. The cases were consolidated for trial.

It is agreed that the Court has jurisdiction.

Defendant is engaged in the fabrication and sale of sheet metal products in and around Burley, Idaho. To an extent, [fol. 130] the corporation installs, maintains and repairs such products. A part of its business consists in sales to individual customers of such items as solder, sheet metal, water spouts and elbows.

Prices are computed on the same basis for all customers —i.e., fabricated products are uniformly priced on the basis of material, operating costs, labor, and a profit.

The greater portion of the company's business is with food processing plants in the Burley, Idaho, area which plants in turn are engaged in producing items going into interstate commerce.

Witnesses described the following items as typical of equipment fabricated for the food processors: a stainless steel receiving tank holding 5,000 pounds of peeled potatoes, hoods to carry off steam and vapor, stainless steel elevator buckets used in processing lines, and chutes to transfer products from one point or one belt to another. On two occasions defendant repaired and rebuilt drying equipment in a processing plant damaged by fire. Most of the work for the processors is carried out during the summer, when the plants are closed for the season.

The following issues of law are before the Court:

1. Whether defendant's employees were during the period in question engaged in the production of goods for commerce within the meaning of the Act.

2. Whether defendant's business is by nature outside the retail concept.

3. Whether defendant's employees are exempt from overtime requirements of the Act by virtue of their employment [fol. 131] in a retail or service establishment as defined by Sections 13 (a) (2) and 13 (a) (4) of the Act.

The Act provides at §203 (j):

> "* * * an employee shall be deemed to have been engaged in the production of goods if such employee

was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any closely related process or occupation directly essential to the production thereof,* in any State." (Emphasis added.)

Whether defendant's employees are covered by the Act depends on the interpretation of the underlined phrase.

In contending defendant's employees are included within this statute, the Secretary relies principally on Roland Electrical Co. v. Walling, 326 U.S. 657, 66 S.Ct. 413. This case was decided in 1946, prior to the amendment of §203 (j) in 1949. At that time the statute defined production of goods for commerce as including "any process or occupation necessary to the production thereof."

The more recent case of Mitchell v. H. B. Zachry Company, 362 U.S. 310, 80 S.Ct. 739 (1960) analyzes the scope of coverage under the Act as amended:

> "* * * The focus of coverage became 'commerce,' not in the broadest constitutional sense, but in the limited sense of § 3(b) of the statute: 'trade, commerce, transportation, transmission, or communication among the several States * * * .' Employment 'in' such activities is least affected by local interests. A step removed from employment 'in commerce' is employment 'in' production which is 'for' commerce. * * * Furthest removed from 'commerce' is employment not 'in' pro- [fol. 132] duction 'for' commerce but in an activity which is only 'related' to such production. * * * " (pp. 743-744)
>
> "* * * our purpose must be to isolate primarily local activities from the flow of commerce to which they invariably relate * * *." (p. 745)

Defendant's enterprise is a local business serving, on the same basis, both individual customers and corporations which produce goods for interstate commerce.

This Court is of the opinion that Mitchell v. Zachry teaches that employment in a local business such as we have here is not employment "in commerce or in the production of goods for commerce" to which employment the Act is confined. In this case the Supreme Court cited with approval the case of 10 East 40th Street Bldg. v. Callus, 325 U.S. 578, 65 S.Ct. 1227, (decided in 1945) at which time the Court distinguished between covered employment and employment in local industry when it said:

> "* * * Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line. * * * Such remoteness is insulated from the Fair Labor Standards Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act. * * *"

The reasoning utilized prior to the amendment of the Act in 1949 should be more forceful since the amendment when the amendment was for the obvious purpose of narrowing the coverage of the Act. According to Mitchell v. Zachry Congress has left the regulation of employment in local business to the states.

[fol. 133] Assuming that defendant's employees might be considered as having been producing goods for commerce within the Act, such employment is within the exemption of §213 which provides:

> "(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located * * *. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry * * *."

The Court finds from the evidence that all of defendant's sales were within the State of Idaho and its products were not sold for resale. The Court also finds from the evidence that the business conducted by defendant was and is considered to be retail within the industry as shown by the testimony of the manager of defendant corporation and representatives of companies selling materials to defendant.

The retail concept described in Roland Electrical Co., supra, was repudiated by the 1949 amendment to the Act. Mitchell v. Kentucky Finance Company, 359 U.S. 290, 79 S.Ct. 756; Boisseau v. Mitchell, 218 F.2d 734 (5th Cir. 1955).

The authorities relied on by plaintiff to establish the contention that defendant is "not within the retail concept" are distinguishable.

Accordingly, it is the opinion of this Court that plaintiff is not entitled to any relief in either of said cases.

Counsel for the defendant shall prepare Findings of [fol. 134] Fact, Conclusions of Law and a proposed Judgment, and shall submit copies of the same to counsel for plaintiff and the originals to the Court.

Dated this 7th day of March, 1963.

Fred M. Taylor, United States District Judge.

[File endorsement omitted]

[fol. 135]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

Civil Action No. 3745

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff,

vs.

IDAHO SHEET METAL WORKS, INC., a corporation, Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW —April 15, 1963

This cause having come over for trial before the Honorable Fred M. Taylor, United States District Judge, plaintiff appearing by James B. Liest, one of his attorneys and the defendant appearing by Eli A. Weston, its attorney, and the Court having considered all of the testimony and evidence, and the plaintiff and defendant having presented their case to the Court and briefs having been submitted by both parties, the Court having considered the record, files, and testimony in this action and being fully advised in the premises, hereby makes the following Findings of Fact:

I.

That the plaintiff, W. Willard Wirtz, Secretary of Labor, United States Department of Labor, brings this action to *enjoin* ~~recover from~~ the defendant Idaho Sheet Metal Works, *from violating the F.M.T.* Inc., a corporation, ~~unpaid overtime compensation due its~~

overtime
~~former employee~~, ~~William D. Combs~~, ~~under the~~ provisions of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.*), hereinafter referred to as the Act.

II.

The defendant is and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Idaho, having a place of business located at Burley, Idaho, within the jurisdiction of this [fol. 136] Court, and is, and at all times hereinafter mentioned was, engaged at that place of business in the fabrication, sale and servicing of sheet metal products.

III.

(a) That jurisdiction of this action is conferred upon the Court by Section 16(c) of the Act and by the Judicial Code, 28 U.S.C. 1337 and 1345.

(b) That by the provisions of Reorganization Plan No. 6 of 1950 (15 F.R. 3174, 64 Stat. 1263), issued under the Reorganization Act of 1949, 5 U.S.C., 133z to 133z-15, the functions of the Administrator of the Wage and Hour Division, United States Department of Labor, under the Act, were transferred to the Secretary of Labor.

IV.

The defendant is engaged in the City of Burley, a small farming community in the State of Idaho, in the making, selling, installing and repairing of sheet metal products including the sale of solder, sheet metal, water spouts, elbows and similar items and that during the years 1959, 1960, and 1961, defendant's products and services were sold to seasonal processing companies engaged in interstate commerce. The sales and services were for the most part made and rendered intermittently and/or during the "down" season.

V.

That the defendant's business was established for the purpose of serving the City of Burley and the surrounding community, making sales and rendering services to a variety of customers, predominating in number of sales to farmers, ranchers, local individuals and businesses. All of the defendant's sales and services were in the State of Idaho and on a retail basis.

VI.

That the defendant's business is local in its nature, was established for the purpose of serving the Burley area, *F.M.T.* ~~is isolated from interstate commerce~~, and is not closely related to nor directly essential to the production of goods for or in commerce, but for the primary purpose of serving local needs.

[fol. 137] VII.

The products sold and services rendered to the processing companies were for the most part similar to items which could be and sometimes are fabricated by the processing companies in their own in-plant shops. The products furnished by the defendant do not enter the channels of interstate commerce.

VIII.

The defendant's prices for services and products are computed on the same basis for all customers. Fabricated products are uniformly priced on the basis of material, operating costs and a profit. The defendant's non-fabricated products, such as steel, solder, and other items, are displayed on racks or shelves and are similar in this respect to what is described as a tin shop.

IX.

The defendant's establishment is recognized as a retail establishment by the defendant and salesmen within the

industry. None of the sales made by the defendant were for resale.

X.

During the years 1959, 1960, and 1961, 75% of the defendant's sales of goods or services (or of both) were recognized as retail sales or services in the particular industry in which the defendant was and is engaged. The defendant's establishment is recognized as a retail establishment within the particular industry in which it is engaged.

From the foregoing Findings of Fact, the Court submits the following Conclusions of Law:

I.

That the Court has jurisdiction in this case.

II.

That the defendant is not engaged in the production of [fol. 138] goods for or in commerce as defined by Section 3 of the Act.

III.

That the business conducted by the defendant meets all the tests of a retail establishment ~~as promulgated by the Administrator of the Fair Labor Standards Act~~ *F.M.T.* and is therefore a retail establishment and entitled to an exemption as such under the provisions of Sections 13(a)(2) and 13(a)(4) of the Act.

IV.

That the defendant's employees are exempt from the overtime requirements of the Act by reason of their employment by a retail and service establishment as defined in Sections 13(a)(2) and 13(a)(4) of the Act.

V.

That the defendant is entitled to a judgment of dismissal.

Dated April 15, 1963.

Fred M. Taylor, United States District Judge.

[fol. 139]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

Civil Action No. 3745

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff,

vs.

IDAHO SHEET METAL WORKS, INC., a corporation, Defendant.

JUDGMENT OF DISMISSAL—April 15, 1963

This Cause Came regularly on for trial on the 4th day of September, 1962, before the Honorable Fred M. Taylor, one of the Judges of the above entitled Court, in the court room thereof in Boise, Ada County, Idaho, on the complaint of plaintiff filed herein and the answer of the defendant, Idaho Sheet Metal Works, Inc., a corporation, pursuant to order of the Court setting the case for trial. The plaintiff appeared by James B. Leist, one of its attorneys; the defendant appeared by Eli A. Weston, its attorney.

The Court having heard testimony on both sides and having prepared Findings of Fact and Conclusions of Law, the Court holds that the plaintiff has failed to prove their case and that the defendant, Idaho Sheet Metal Works, Inc., is entitled to a Judgment of Dismissal.

Now, Therefore, By virtue of the law and by reason of the premises aforesaid, It Is Hereby Ordered, Adjudged and Decreed That the above action be dismissed with prejudice.

Dated: This 15th day of April, 1963.

Fred M. Taylor, United States District Judge.

[fol. 140]

In the United States District Court

For the District of Idaho

Southern Division

Civil Action No. 3752

W. Willard Wirtz, Secretary of Labor, United States Department of Labor, Plaintiff,

vs.

Idaho Sheet Metal Works, Inc., a corporation, Defendant.

Judgment of Dismissal—April 15, 1963

This Cause Came regularly on for trial on the 4th day of September, 1962, before the Honorable Fred M. Taylor, one of the Judges of the above entitled Court, in the court room thereof in Boise, Ada County, Idaho, on the complaint of plaintiff filed herein and the answer of the defendant, Idaho Sheet Metal Works, Inc., a corporation, pursuant to order of the Court setting the case for trial. The plaintiff appeared by James B. Leist, one of its attorneys; the defendant appeared by Eli A. Weston, its attorney.

The Court having heard testimony on both sides and having prepared Findings of Fact and Conclusions of Law, the Court holds that the plaintiff has failed to prove their case and that the defendant, Idaho Sheet Metal Works, Inc., is entitled to a Judgment of Dismissal.

Now, Therefore, By virtue of the law and by reason of the premises aforesaid, It Is Hereby Ordered, Adjudged and Decreed That the above action be dismissed with prejudice.

Dated: This 15th day of April, 1963.

Fred M. Taylor, United States District Judge.

[fol. 141]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION —June 9, 1964 (omitted in printing)

[fol. 142]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 18,887, 18,888

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Appellant,

vs.

IDAHO SHEET METAL WORKS, INC., a Corporation, Appellee.

Appeal from the United States District Court for the District of Idaho.

OPINION—August 10, 1964

Before Pope, Hamley and Merrill, Circuit Judges.

PORE, Circuit Judge.

The Secretary of Labor brought two actions in the court below for the purpose of enforcing compliance by the defendant Idaho Sheet Metal Works, Inc. with certain requirements of the Fair Labor Standards Act.[1] In one action the Secretary sought to enjoin further violations by the defendant of the overtime provisions of the Act.[2] In the other action the Secretary sought recovery of unpaid overtime compensation on behalf of one of the defendant's employees.[3] The two actions were consolidated for trial [fol. 143] and after dismissal of the actions by the trial court, with prejudice, the appeals therefrom were consolidated for hearing in this court.

The facts here are undisputed. It is conceded that during the years 1959 through 1961, the defendant did not pay its employees, some twelve in number, in accordance with the overtime provisions of the Fair Labor Standards Act, and it is admitted that this practice has continued thereafter. It was stipulated that if recovery was had in the action to recover the employee's overtime compensation, recovery should be for the sum of $500 plus costs.

Upon the trial and in this court two questions were presented. The first question was whether any of the defendant's employees were engaged in the production of goods for commerce within the meaning of the Act. Since the record shows that the defendant's employees were engaged in the performance of work for its customers who were producing goods for interstate commerce, the query, stated more particularly, was whether defendant's em-

[1] Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended by Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 29 U.S.C. 201, et seq. Other amendments of 1961 (75 Stat. 65) are not material here.

[2] Such injunction proceedings are authorized by Sec. 17 of the Act (29 U.S.C. Sec. 217).

[3] Such an action is authorized by Sec. 16(c) of the Act (29 U.S.C. Sec. 216(c)).

ployees were engaged in a "closely related process or occupation directly essential" to the interstate production of its customers.[4] The second question presented is whether the defendant is a retail establishment exempt from the requirements of the Act under Sec. 13(a).[5] The trial court found against the Secretary on both questions.

[fol. 144] During the years 1959 through 1961, the defendant was engaged in manufacturing, installing, maintaining and repairing equipment made of sheet metal for five large potato processors located in the general area of Burley, Idaho, where defendant's place of business was located. During that period 83 per cent of defendant's gross income was derived from those customers. In addition it performed comparable work for five other companies which were en-

---

[4] The section of the Act relevant in this regard is Section 3(j) which reads: "Sec. 3. As used in this Act— (j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

[5] The relevant portions of Section 13 read as follows: "Sec. 13(a). The provisions of sections 6 and 7 [the Act's minimum wage and overtime requirements] shall not apply with respect to * * * (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishments annual dollar volume of sales of goods or services is made within the State in which the establishment is located * * *. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale, and is recognized as retail sales or services in the particular industry; or * * * (4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: Provided, that more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *."

gaged in producing goods for interstate commerce including sugar mills, flour mills, seed and grain companies, and a container corporation. This accounted for an additional 3 per cent of defendant's gross income. The equipment which defendant fabricated or repaired for these companies included tanks of a capacity to hold 5,000 pounds of peeled potatoes, hoods for carrying off steam, and elevator buckets and chutes for transferring items within the plants.[6] During many weeks in those years the employees of defendant spent a substantial part of their total work hours in these activities relating to the fabricating of equipment for the customers mentioned. A substantial portion of this work was carried on in the customer's plant.

In dealing with the question whether the defendant's employees were engaged in production of goods for commerce within the meaning of Sec. 3(j) of the Act, the court, [fol. 145] while finding in so many words that the defendant's business was "not closely related to nor directly essential to the production of goods for or in commerce,"[7] based its conclusion upon its finding that the defendant's "enterprise is a local business". The reasoning adopted by the trial court was that once it had determined that the employer was engaged in a "local business" it followed that

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[6] The employees were sheet metal workers and they were employed at defendant's sheet metal plant which was a high ceilinged cinder-block building. The building was not equipped with any of the facilities common in a retail establishment in that it had no display windows, sales counters or cash registers. The equipment consisted of work benches and machinery for working on sheet metal. The metals used in the fabrication mentioned were primarily stainless steel, galvanized iron, black iron plate, aluminum and copper. The fabricated and installed equipment was not maintained in stock by the defendant but it was made to order in each case.

[7] Note that so stated this is not precisely the question involved under the Act which states the important query to be whether "such employee was employed . . . in any closely related process or occupation directly essential to the production thereof, in any state." (Emphasis added.)

his employees could not be engaged in the production of goods for commerce.

The trial court was led to this reasoning by its interpretation of the decision in Mitchell v. H. B. Zachry Company, 362 U.S. 310. While it is true that the opinion in that case contains certain references to "local business", to "activities of a dominantly local character", to "primarily local activities", and to "local production", we think that the trial judge was misled by the use of these phrases, and that, contrary to the trial court's opinion, the Zachry decision does not hold that employment in "a local business" excludes it from being treated as employment in the production of goods for commerce.

The court below fell into the same error which led to the decision of the Court of Appeals for the Fourth Circuit in Mitchell v. Lublin, McGaughy & Assoc., 250 F. 2d 253, 259. In that case the employees involved were draftsmen, field clerks and stenographers employed by an architectural firm. All of these employees worked with plans and specifications prepared by their employer for the repair and construction of various interstate instrumentalities including air bases, roads, radio and television installations. The Court of Appeals held that "the defendants in this case were independent engineers and architects engaged in essentially local activity in each of the offices which they maintained." Referring to the fact that the firm sent telegraph messages, and used the mails to transmit documents to other states, the court said (pp. 259-260): "[W]here the business is essentially local and there is no production of 'goods', communication which is merely incidental to the local enterprise cannot be classed as commerce. . . . [T]he Act does not attempt to regulate local activity. . . . [T]he [fol. 146] architectural work itself was local and of necessity gave color to the activities of their subordinates and took them outside the scope of the statute." After grant of certiorari this judgment of the Court of Appeals was reversed, Mitchell v. Lublin, McGaughy & Asso., 358 U.S. 211. The Supreme Court noted that the decision of the

lower court was based upon its conclusion that the activities of the employing firm were "local in nature". It held, however, that in order to determine whether these employees were engaged in commerce "we focus on the activities of the employees and not on the business of the employer." Said the Court (p. 212): "The test is 'whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity.' . . . Respondent contends that *its* activities are essentially local in nature. But as we stated, Congress deemed the activities of the individual employees, not those of the employer, the controlling factor in determining the proper application of the Act. Here the activities of the employees show clearly that they are 'engaged in commerce' and thus are eligible for the protections afforded by the Act."

It is important to note that in the language just quoted the Supreme Court first inquired whether the work of the employees is "directly and vitally related to the functioning of an instrumentality or facility of interstate commerce." If that question is answered in the affirmative then it can be said that the enterprise is not a local activity. It is obvious that the Court of Appeals in that case, as did the court below in this case, began its inquiry at the wrong end by first asking whether the enterprise was a "local activity". As the Supreme Court in the Lublin case, above, made clear, that is in no sense the test.

In the Zachry case, supra, upon which the trial court relied, the respondent employer was a construction contractor employed to construct a dam for impounding water for a water district to supply water to the City of Corpus Christi. An unspecified amount of the water supplied by the district was consumed by facilities and instrumentalities of commerce. It was plain here that neither the city nor the district was engaged in the production of goods for commerce. The Court held in that case "neither a facility

[fol. 147] of 'commerce' nor a facility of 'production' is under construction. Operation of the completed dam will merely support production facilities; and construction of the dam is yet another step more remote." (p. 319) Thus the decision is based upon the Court's finding of the remoteness of the construction from any facility of commerce or of production that might be within the terms of the Act, and not upon any finding that the construction work was of "a local character." [8] In setting forth the test to be applied in a case of this kind the Court made it plain that an answer to the problem presented cannot be predicated upon a finding as to whether the enterprise carried on by the employer is local or otherwise. The Court alluded to (p. 315) "the governing principle that coverage turns upon the nature of the employees' duties, and not upon the nature, local or interstate, of the employer's general business."

A Supreme Court case whose facts most closely resemble those in the case now before us is Roland Co. v. Walling, 326 U.S. 657 (1949). Roland Co. was engaged in manufacturing, installing, and servicing electrical motors, generators, etc. A substantial portion of its business was done with companies directly engaged in interstate commerce. During practically every work week Roland's mechanics did some of this work for some of these customers, either in the repair of their motors or generators, in the reconstruction of used motors sold to them, or in performing electrical work at their establishments. It was held that these employees were engaged in the production of goods in interstate commerce and that they were within the coverage of the Act.

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[8] After finding the construction to be too remote from any production of goods for commerce to be either "closely related" or "directly essential" to production, it was not inappropriate for the Court to conclude that it was dealing with something which had a "local character".

The court below declined to follow the Roland case on the ground that the 1949 amendment of the Act[9] undercut its [fol. 148] authority, holding that the later case of Zachry, supra, disclosed that the Roland case was no longer good law.

In a later portion of this opinion we shall have occasion to point out the very limited effect which the 1949 amendment had with respect to the authority of Roland. The legislative history of the 1949 amendment shows beyond doubt that the holding in Roland that those employees were engaged in the production of goods in interstate commerce and were within the coverage of the Act, would not be affected by the 1949 amendment. During the discussion of the amendment on the floor of the Senate, Senator Holland, the main sponsor of the amendment, answering a question whether Roland would "be decided any differently under the proposed amendment," answered "definitely not". (95 Cong. Rec. 12505.) And in connection with the Conference report on the bill, the House Managers reported: "The bill as agreed to in conference also does not affect the coverage under the act of employees who . . . make, repair or maintain machinery or tools and dies used in the production of goods for commerce. . . . All the employees mentioned in this paragraph are doing work that is closely related and directly essential to the production of goods for commerce." (Conference Report, Statement of the House Managers, U.S.Code & Cong. Serv., 91st Cong., 1st Sess. p. 2253.)

This brings us to the question which, as indicated in the Lublin case, supra, must be answered to resolve the first point presented here. We inquire whether the work of these

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[9] In 1946 Sec. 3(j) instead of referring as at present, to "any closely related process", etc., used the words *"any process or occupation necessary to the production thereof* in any state." By the 1949 amendment the italicized words just quoted were changed to the language of the Act which now reads "any closely related process or occupation directly essential to the production thereof in any state."

employees of defendant was "so directly and vitally related to the functioning" of these potato processors, sugar mills, etc., as to be in practical effect a part of those interstate enterprises. In the words of the Act, the inquiry is whether these employees were engaged "in any closely related process or occupation directly essential" to the production which was carried on by the potato and sugar processors, etc., previously mentioned. We think it is plain that the answer must be in the affirmative.

As we have indicated above, the trial court, besides holding that these employees were not covered by the Act, held also that defendant was exempt from the Act's minimum wage and overtime requirements by reason of its being [fol. 149] recognized as an establishment engaged in retail sales or services in the industry.[10] It is plain that this finding of the court was predicated upon testimony which defendant offered to the effect that within the industry the defendant's business was and is considered to be retail. We think that such is not an appropriate basis upon which to determine whether the retail exemption applies to the defendant in this case. In Mitchell v. Kentucky Finance Co., 359 U.S. 290, the defendant had succeeded in the Court of Appeals in maintaining its assertion of the retail exemption on the ground that "their activities are recognized in the financial industry as being 'in the retail end' of the industry." In reversing the decision of the Court of Appeals, the Supreme Court made it plain that even though an establishment's activities might be recognized as being retail in the particular industry, the establishment does not come within the meaning of the retail exemption

[10] The court's opinion stated as follows: "The Court finds from the evidence that all of defendant's sales were within the State of Idaho and its products were not sold for resale. The Court also finds from the evidence that the business conducted by defendant was and is considered to be retail within the industry as shown by the testimony of the manager of defendant corporation and representatives of companies selling materials to defendant."

unless its business falls within the "retail concept" of the Act. We had occasion to note this in Goldberg v. Roberts, 9 cir., 291 F. 2d 532, 534. As we there said: "If by its nature appellee's business is 'outside the retail concept' the Sec. 13 exception cannot apply."

The trial court here decided that defendant's business was within the retail concept in the following manner: It noted that in Roland, supra, the Supreme Court had held that concern outside the retail concept. There the Court said (p. 666): "[T]he exemption reaches employees of only such retail or service establishments as are comparable to the local merchant, corner grocer or filling station operator who sells to or serves ultimate consumers who are at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach." It seems obvious that if the tests applied in the Roland case are applied here, we must conclude that the defendant is not within the retail exemption.

[fol. 150] The trial court disregarded the Roland test test stating that the retail concept described in Roland "was repudiated by the 1949 amendment to the Act", citing Mitchell v. Kentucky Finance Co., supra. But the latter case shows that the 1949 amendment served no such purpose. The Roland case had indicated approval of a rule to the effect that sales of goods or service for "business use" were not retail. The Kentucky Finance case shows, as does the legislative history of the 1949 amendment, that the sole purpose of that amendment was to do away with this "business use" test. The Court said: "We find nothing in the debates or reports which suggests that Congress intended by the amendment to broaden the fields of business enterprise to which the exemption would apply. Rather it was time and again made plain that the amendment was intended to change the prior law only by making it possible for business enterprises otherwise eligible under existing concepts to achieve exemption even though more than 25 percent of their sales [were not retail under the old

business use test]." 359 U.S. at 294. To the same effect see Goldberg v. Roberts, supra. That the 1949 amendment had this limited effect is clear from the legislative history of that amendment.[11]

When we consider all the facts in the present case, the operation in a factory-like building equipped only for manufacture and repair of the fabricated metal products, with a substantial portion of the time of its employees devoted to fabricating large metal equipment for use by potato processors, sugar mills and similar enterprises, we cannot agree that the enterprise fell within the retail concept described and referred to in these decisions.

In addition we should note that the 1949 amendments to the Act recited that prior rulings by the Administrator [fol. 151] with respect to enterprises within or without the retail exemption should remain in effect unless inconsistent with the statute as amended. In his 1942 Wage and Hour Manual, p. 326, secs. 29-31, the Administrator listed types of business which were outside the retail exemption and which were similar to the business of the defendant. Among these were "machine shops and foundries", "industrial blacksmiths" and "establishments engaged in sharpening and reconditioning industrial tools."

We hold that the defendant was not engaged in business within the retail exemption provisions of Sec. 13 of the Act.

The judgments are reversed and the causes remanded with direction to enter judgments for the appellant.

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[11] Representative Lesinski, one of the Managers for the House, referring to a reference to Roland in the House Managers' Statement, stated that this reference "should not mislead anyone into concluding that the conference intended to reverse or nullify that decision" (95 Cong. Rec. 14942).

The Senate Conferees' report stated that the amendment did not change the status of establishments "selling industrial goods and services to manufacturers engaged in the production of goods for interstate commerce and to other industrial and business customers (such as the establishment in Roland Electrical Co. v. Walling, (326 U.S. 657)." (95 Cong. Rec. 14877.)

[fol. 152]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,887

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor, Appellant,

vs.

IDAHO SHEET METAL WORKS, INC.,

a corporation, Appellee.

JUDGMENT—Filed and Entered August 10, 1964

Appeal from the United States District Court for the District of Idaho.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court with direction to enter judgment for the appellant.

[fol. 153]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,888

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor, Appellant,

vs.

IDAHO SHEET METAL WORKS, INC., a Corporation, Appellee.

JUDGMENT—Filed and Entered August 10, 1964

Appeal from the United States District Court for the District of Idaho.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court with direction to enter judgment for the appellant.

[fol. 154] [File endorsement omitted]

[fol. 155]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Appellant,

vs.

IDAHO SHEET METAL WORKS, Appellee.

PETITION FOR REHEARING OF APPELLEE—
Filed September 10, 1964

[fol. 156] To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Idaho Sheet Metal Works, Inc., Appellee herein, respectfully requests a rehearing in this Court upon the decision of this court filed August 10, 1964 upon the following grounds and for the following reasons:

1. The court misinterpreted the Mitchell v. H. B. Zachery decision, 362 U. S. 310, in holding that the Zachery decision differed from the instant case. In both cases the employer's businesses were strictly local in nature, established to serve a local purpose and in the instant case the employee's relation to the interstate business was irregular, intermittent, remote and not closely related and essential to the operation of the interstate shipments.

The materials furnished for the interstate shippers were small items, not processing machinery, sold and installed at retail in the same manner that similar products would be sold to other purchasers and were sold and installed only at *intermittent and irregular* times and *almost all sales and services during the down period of the seasonal operations.*

On page 56 of the transcript we have the following statement from the president of the employer company.

> "Q. I was not talking of machinery, I was talking of equipment.
>
> A. Machinery or equipment.
>
> [fol. 157] Q. You do build potato processing equipment at Burley?
>
> A. Not processing equipment, no."

The record shows that the large item (five thousand gallon tank) was built as an emergency in 1955 after a fire.

In the Zachery case, as in the instant case, the store was built to serve a local purpose and as in the Zachery case, some of the employees of the defendant employer during some periods worked on materials that were sold to the interstate shipper and rendered services intermittently, irregularly and during the down period and as emergency services to the interstate shipper. Under these circumstances the defendant clearly feels that its employees cannot be construed as being closely related to and directly essential for the production of goods for commerce.

The important question involved in both the Zachery case and the instant case is whether the federal government is encroaching upon local business normally under the protection of the state.

All of the cases referred to by the government, including Roland Co. v. Walling, 326 U. S. 657, show that the employer and the employees involved were rendering an essential and necessary service or material *on a regular basis* either day to day or other regular intervals and that without these services and materials, the interstate companies [fol. 158] could not operate or function. This is not the fact in the present case. On page 84 of the transcript we have the following questions and answers propounded to the president of the company:

> "Q. Do you know of your own knowledge whether t' [illegible] rocessing plants could make the products that you

make and render the services that you render if they wanted to?

Mr. Leist: Object, its conjecture.

The Court: He may answer the question 'yes' or 'no' whether he does know.

By Mr. Weston:

Q. Do you know?

A. Yes.

Q. Could they operate without your services if they had to?

A. They could and do many times.

Q. Do you know the occasions where they use your services or buy your product, why?

A. Generally because we are more capable of doing them.

Q. Is it also because they are rushed sometimes?

[fol. 159] A. Yes—more capable and we are able to get on the job and get it done quicker because of the time element."

On page 81 of the transcript we find a statement by the government's principal witness that the materials purchased from the defendant employer were sometimes ordered in advance and quite frequently were not even delivered or used.

"Q. Is it a practice on some occasions to have them come to you and say in effect, 'We would like to have this particular thing made by you to be installed at a later date—an unknown date'?

A. That happens quite frequently.

Q. Do they sometimes ask you to make something and install it only during the down period?

A. Quite frequently.

Q. How do you work on that item that I have just described?

A. We work on it according to where the demand is. If we have other work that is demanding our time we work on that that is ordered when it is convenient.

Q. On these items or the similar items, they would have nothing to do with the plant's operation.

[fol. 160] A. At that particular time?

Q. Yes.

A. No."

And the same witness testifying as to the amount of work done in this manner:

"Q. Or percentagewise?

A. It would be very difficult, it's a very changeable situation."

On page 30 of the transcript:

"Q. You patronize the Defendant, as I believe you testified, when you are short of help and time and you want something done in an emergency and right away, is that correct?

A. That is correct."

The respondent respectfully suggests that the court erred in holding that the respondent's business is outside the traditional concept of a retail establishment. First, because the basis by which industries even remotely related to Respondent (Industrial Blacksmiths) were determined to be non-retail were so determined by application of the overruled and repudiated "Business use test." This court stated, in interpreting *Mitchell v. Kentucky Finance Company,* 359 U. S. 291, 3 L.Ed. 2d 615 (1959), in Goldberg v. Roberts, 291 F. 2d 532 (9th Cir.—1961) that industries once [fol. 161] considered non-retail will not because of the 1949 amendment be considered retail, *unless that non-retail determination was due to an application of the "Business Use" test.*

"The trial court correctly summarized the controlling principle established by Kentucky Finance.

'(1) It is that where it has been established by pre-amendment (i.e., Pre-1949) interpretation that an industry is not retail, *unless that classification was due to an application of the business use test,* that industry is not now exempt.' Mitchell v. Roberts, D.C.S.D. Cal. 1959, 179 F. Supp. 247, 249."

On page 535:

"In our opinion, then, the trial court erred in characterizing the pre-1949 status of mailing shops to be 'retail.' There is no indication that the pre-1949 classification of letter shops was based on the ground that such shops sell their services to businesses rather than to individuals for personal consumption. *Thus the pre-1949 classification of letter shops has not been shown to be founded upon the 'business use test,' which Congress specifically rejected in 1949* (see Mitchell v. Kentucky Finance Co., supra at pages 293-294, 79 S. Ct. at page 758). If this view of the case is accepted, no further investigation is required." (Emphasis supplied)

The 1942 Wage and Hour manual discloses that the cases [fol. 162] which classify "Industrial Blacksmiths," and "Machine Shops" as being non-retail are: Roland Electric Co. v. Walling, 325 U. S. 657; Guess v. Montague, 140 F. 2d 500; Walling v. Thompson, 65 F. Supp. 686. *The basis of all these decisions is an application of the "business use" test.*

While it was not the intent of the 1949 Amendment to give exempt status to those *industries already* declared non-exempt, it was also not the intent of this law to perpetuate the "business use" test, which will happen if every new industry's retail status is determined by cases using the business use test.

Secondly, the evidence clearly shows that the business under consideration is not similar to those in the Roland case, or any of the other cases cited by the Administrator. It is not an "industrial Blacksmith," "Machine Shop" or a shop engaged in "Reconditioning Industrial tools." It is a specific, well-defined business called the "Custom Sheet Metal Industry." Tr. pps. 63-76, 44, 54, 51, 112. Since it is a business having its own distinct characteristics it should be considered as of first impression, not pigeonholed into an unrelated industrial classification by virtue of decisions based upon a test now expressly repudiated. Respondents respectfully urge this court to consider this business independent of such broad classifications as "Industrial Blacksmiths," "Machine Shops," etc.

[fol. 163] Under all of the circumstances presented here, the Respondent respectfully requests a rehearing on the points urged herein.

Respectfully submitted,

By Eli A. Weston, Attorney for Appellee, 711½ Bannock Street, Boise, Idaho.

I, Eli A. Weston, attorney for Appellee and Petitioner, hereby certify in compliance with Rule 23 of the United States Court of Appeals for the Ninth Circuit, that in my judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay.

Dated this 8th day of September, 1964.

Eli A. Weston

[fol. 164]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING—September 15, 1964

Before: Pope, Hamley & Merrill, Circuit Judges.

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellee filed on September 10, 1964, with permission of the Court, for a rehearing of above cause be, and hereby is denied.

[fol. 165]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,887
18,888

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor, Appellant,

vs.

IDAHO SHEET METAL WORKS, Appellee.

OPINION ON PETITION FOR REHEARING—
Filed September 15, 1964

Before Pope, Hamley and Merrill, Circuit Judges.

Decision of the court in this case was rendered on August 10, 1964. Under our Rules the final day for filing a petition for rehearing was September 9, 1964. On September 10, 1964, one day late, the appellee presented to the

Clerk for filing a petition for rehearing. Although no application for an extension of time within which to file such petition was presented. It Is Ordered that said petition may be filed by the Clerk as of the date of its receipt.

Upon consideration of said petition It Is Ordered that the same be denied.

Martin L. Pope, Frederick G. Hamley, Charles Merrill, United States Circuit Judges.

[File endorsement omitted]

[fol. 166] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 167]

SUPREME COURT OF THE UNITED STATES

No. 754, October Term, 1964

IDAHO SHEET METAL WORKS, INC., Petitioner,

v.

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor

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ORDER ALLOWING CERTIORARI—March 1, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted limited to Question 2 presented by the petition which reads as follows:

> "2. Is the employer's shop a retail establishment and entitled to the exemption as such under Section 13(a) of the Fair Labor Standards Act?"

The case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.

[redacted]

Petitioner,

v.

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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[redacted]

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IN THE

Supreme Court of the United States

October Term, 1964

No.....

IDAHO SHEET METAL,

Petitioner.

vs.

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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Idaho Sheet Metal, your petitioner, prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the above case pending in that Court.

OPINIONS BELOW

The opinion of the United States District Court in and for the District of Idaho, Southern Division, en-

tered March 7, 1963 (Appendix A, infra, pages 1-2) is not reported. The opinion of the Court of Appeals for the Ninth Circuit entered August 10, 1964 (Record, folio 73 through 82) has not yet been reported.

JURISDICTION

The judgment of the Court below (Record folio 82) was entered on August 10, 1964. A timely petition for rehearing was denied on September 15, 1964 (Record folio 95), five days after its filing (Record folio 85). The jurisdiction of this Court is invoked under 28 U. S. C. A. 1254 (1).

QUESTION PRESENTED

1. Are the employer's employees so closely related and directly essential to the production of goods for commerce as to be engaged in the production of goods for commerce;

2. Is the employer's shop a retail establishment and entitled to the exemption as such under Section 13(a) of the Fair Labor Standards Act?

STATUTES INVOLVED

The following statutory provisions are set forth in Appendix B, infra, page 1; Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the act

of 1949, c. 736, 63 Stat. 910, 29 U.S.C. 201, *et seq.*:

Section 3(j)

Section 13(a)(2)

Section 13(a)(4).

STATEMENT

These are two actions brought by the Secretary of Labor under the Fair Labor Standards Act. Section 17 of the act authorizes the district Courts of the United States to restrain violations of the Act, while Section (16)(c) authorizes the Secretary of Labor to bring suit on behalf of employees to recover amounts due them under Section 6 and 7, minimum wage and overtime provisions of the Act. Accordingly, cause No. 18887 was brought by the Secretary pursuant to Section 17 to enjoin further violations by defendant of the act's overtime provisions, while cause No. 18888 was instituted under Section 16 (c) to recover unpaid overtime compensation on behalf of one of defendant's employees, William D. Coombs. The two actions were consolidated for trial at the conclusion of which the District Court held that defendant's employees were not within the coverage of the act, and, further, that defendant's enterprise was an exempt establishment (Appendix A pages 1-2). Notices of Appeal were filed and on September 24, 1963 a motion to consolidate these actions for purposes of appeal was granted by the U.S. Court of Appeals, Ninth Circuit.

The petitioner operates a sheet metal shop in a small agricultural area, Burley, Idaho. The shop was established in 1957 for the purpose of serving the local communities needs in the custom fabrication and making of sheet metal or tin items to be sold or installed for the general public including merchants, farmers, individuals, and in some instances manufacturer's product. The products were all made and sold at a retail price computed by adding a profit to the cost of labor and materials.

Some time after the shop was established, manufacturers of frozen food products located in the community and intermittently at irregular intervals used the facilities of the defendant for the installation of such items as air ducts, air conditioning equipment, storage tanks, elevator, buckets, endless conveyor belts, conductors, and chutes.

The Court of Appeals for the Ninth Circuit reversed the judgment of the District Court and remanded the case to the District Court to enter judgment in behalf of the plaintiff (Record folio 82).

REASONS FOR GRANTING THE WRIT

I.

The decision of the U.S. Court of Appeals in the Ninth Circuit is squarely in conflict with this court's decision in *Mitchell v. H. P. Zachry Company*, 362 U.S. 310.

In the Zachry case, the employees in question were employed by an independent employer constructing a dam to increase the reservoir capacity to create and expanded reservoir for the district. The water impounded by the district was supplied partially to consumers locally within the state of Texas, including a city. Approximately forty per cent to fifty per cent of all the water consumed from the system is accounted for by industrial or interstate users, and it is agreed the water is essential to these operations.

In the Zachry case the facility was constructed to serve a local purpose, but at the same time it furnished water to firms that were engaged in production of goods for commerce. This court in deciding the case ruled that even though the water was "directly essential" to the production of goods for commerce, the employer's operation was not "closely related" as it had the attributes of a local establishment and was therefore not directly essential to the production of goods for commerce.

With regard to the petitioner's business, the evidence clearly shows that the establishment has a background and history of local purpose innaugurated to serve local needs. It was also shown that the requirements by the interstate producers were irregular and intermittent and that the interstate producers operate on a seasonal basis and the services of the defendant are not required at all times.

The circuit court proceeded upon the erroneous assumption that this court in the Zachry case held, in ef-

fect, that the construction of the dam was not directly essential to the interstate producers. This is directly in conflict with the express holding in the Zachry case:

> "Moreover, though construction and operation of this dam are equally 'directly essential' to the producers who require the water impounded and distributed, neither the construction or the operation of the dam was designed for their use."

The correct test then is whether or not the plant or facility is constructed and designed and intended strictly for the use of the interstate producer. In the case before this court, the undisputed evidence shows that this establishment was designed to service local needs and was in existence and operation before the interstate producers established plants in the Burley area.

The circuit court of appeals for the Ninth Circuit inappropriately applied the holding in the *Roland Electrical Company v. Walling*, 326 U.S. 657 to the facts and type of industry engaged in by your Petitioner and concluded that the holding in the early 1946 case was dispositive of the issues before it. In the Rowland case the defendant was engaged in manufacturing, installing, and servicing electrical motors, generators, etc. It is amply clear from the evidence in this case that the defendants are not manufacturers. They have no assembly line type of production, but merely perform all services through specifications and on a "custom-made" basis. The Roland Electrical Company was not established to serve a local demand and had no history or

background as a retail establishment serving a local need. For this reason it differs substantially from the Zachry case and the case presently before this court.

The decision in this case is also squarely in conflict with this court's decision in Kirschbaum v. Walling, 316 U. S. 517, 62 Supreme Court 1116, 86 L.Ed. 1638 (1942); Borden Company v. Borella, 325 U. S. 679, 65 S.Ct. 1223, 89 L.Ed. 1865 (1945); and 10 East 40th Street Company v. Callus, 325 U. S. 578, 65 S.Ct. 1227, 89 L.Ed. 1806 (1945). In the Kirschbaum case this court interpreted the phrase "necessary to the production of goods for commerce" as extending to employees of the owner of a loft building who were engaged in the operation and the maintenance of the building where the tenants were principally engaged in the production of clothing for shipment in interstate commerce. This court pointed out that even though the owner of the building was in no way affiliated with the tenants and did not produce goods for commerce the work of his employees had such a close and immediate tie with the production by the tenants that they were an essential part of it and therefore the employees occupations were necessary to such production. In the Borden company case this court reached a similar conclusion in holding that the act applied to porters, elevator operators, and night watchmen employed in the New York City office building owned by Borden Company, an interstate producer of food products. The whole building was largely tenanted by Borden's essential offices, but there was no production facilities located in the building. This court

found that the extensive and detailed supervision, management and control of operations maintained by executives and administrators located in the building were found to be just as essential to the productive activity of Borden's scattered operating facilities as the direct physical labor performed in the loft in Kirschbaum. Since the employees in the Borden case stood in the same relationship to "production" as did those in Kirschbaum, this court held that occupations were necessary to production for commerce and covered by the act. In the Callus case, however, a totally different result was reached by this court even though the employees of the building performed the same task as those involved in the Kirschbaum and Borden company cases, supra. In Callus office space in a 48 story New York office building was held out for general tenancy and was leased to over 100 tenants engaged in a great variety of enterprises. Even though a substantial portion of the tenants were shown to be enaged in the production of goods for interstate commerce this court concluded:

> "Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business and makes the employees of such a building engaged in local business. Mere separation of an occupation from the physical process of production does not preclude application of the fair labor standards act. But remoteness of a particular occupation from the physical process is a relevent

factor in drawing the line. Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods."

325 U. S. at 583, 65 S.Ct. at 1229, 89 L.Ed. 1806. The fundamental distinction between Kirschbaum on the one hand and Callus on the other is that in the Kirschbaum and Borden Company cases the buildings were "dedicated" solely to the use of tenants engaged in the production of goods for commerce. In Kirschbaum and Borden the buildings were not open for general tenancy or to the general public, but were, in effect designed and intended for use by those interstate producers. There was a lasting, dominant relationship between the activities for which the building was used and production for commerce. In Callus, on the other hand, it is the absence of any such relation to interstate commerce which removed the employment from the coverage of the act. Any connection with commerce in Callus was purely fortuitous and subject to change. The major reason being that in the Callus case the building was held out for general tenancy and was leased to over 100 tenants engaged in a great variety of enterprises. While in the Kirschbaum and Borden cases the buildings were not open for general tenancy and restricted to the sole and exclusive use of the interstate producers. This distinction is of singular importance in this case, in that the outstanding feature of the employment of the defendant corporation is a complete lack of dedication to production for commerce. The defend-

ant's custom sheet metal operations are held out on the same terms for the use of anyone in the geographical area served. The business is a local business in nature and was not instituted for the sole purpose of serving large processing firms. The business was *in existence* and *serving the local populace before the processing plants commenced their operation.*

It is submitted that the custom sheet metal business has revealed by the record "spontaneously satisfies the common understanding of what is local business" and the employees of such an employer are engaged in local business.

As a matter of fact, this particular destruction drawn between Callus on the one hand and Kirschbaum and Bordon on the other was also discussed and followed in Mitchell v. H. P. Zachry Company, supra.

II.

The decision of the U. S. Circuit Court of Appeals for the Ninth Circuit in this case is in conflict with a prior Ninth Circuit case, Goldberg v. Roberts, 291 F. 2d. 532 (Ninth Circuit-1961) and Wirtz v. Modern Trashmoval, Inc., 323 F. 2d. 451 (Fourth Circuit-1963).

Section 13(a)(2) of the Fair Labor Standards Act, as revised in 1949, specified three tests which must be met by an establishment seeking to qualify for the retail service establishment exemption: (1) 50% of its annual dollar volume of sales of goods or services must

be made within the state; (2) 75% of its total sales volume must not be for resale; (3) 75% of its total sales volume must be recognized as retail sales or services in the particular industry. (Appendix B, page 1)

In 1959 this Court in Mitchell v. Kentucky Finance Company, 359 U. S. 290, 79 S.Ct. 756, 3 L.Ed.(2) 815 (1959) added a further test, namely, that a business must have a traditionally "retail concept." This court also decided that this "retail concept" is to be determined by the status of the industry prior to 1949. In other words, if the industry under consideration had been determined by a 1949 administrator's ruling or case law not to be a retail establishment, this status maintains and it will not be said to be retail after the 1949 amendment.

In Goldberg v. Roberts, the Ninth Circuit held that a "letter shop" engaged in the business of addressing, stuffing and mailing of letters for business establishments was by nature not outside the "retail concept," so as to be exempt from wage record keeping and shipping of provisions of the Fair Labor Standards Act. In arriving at this conclusion, the Ninth Circuit was called upon to determine whether or not letter shops had a retail or non-retail status prior to 1949. In determining that letter shops do not have a retail status the U. S. Court of Appeals stated the following:

"In our opinion, then, the trial court erred in characterizing the pre-1949 status of mailing shops to be 'retail.' There is no indication that pre-1949 clas-

sification of letter shops was based on the ground that such shops sell their services to business, rather than to individuals for personal consumption. Thus, the pre-1949 classification of letter shops has not been shown to be founded upon the 'business use test,' which Congress specifically rejected in 1949. (See Mitchell v. Kentucky Finance Company, Supra. at pages 293-294, 79 Supreme Court at page 758.)"

The Court of Appeals states here that the proper test to be used is whether or not the pre-1949 status of an establishment was determined by an application of the repudiated "business use test." The Ninth Circuit then held that as long as the pre-1949 status was not attributed as a result of the business use test its non-retail position is still in effect. In the case presently before this Court the Ninth Circuit stated the following with regard to the proper test to use in order to determine whether or not the business is "outside the retail concept."

"The trial court here decided that defendant's business was within the retail concept in the following manner:
It noted that in Roland, Supra, the Supreme Court had held that concern outside the retail concept. There the court said (page 666):

'(T) The exemption reaches employees of only such retail or service establishments as are comparable to the local merchant, corner grocer, or filling station operator who sells to or serves ultimate

consumers who are at the end of, or beyond, that "flow of goods in commerce" which it is the purpose of the act to reach."

"It seems obvious that *if the tests applied in the Roland case are applied here, we must conclude that the defendant is not within the retail exemption.*" (Emphasis ours) (Record, Folio 80)

In other words, the Ninth Circuit approved and applied the test used in the Roland case, Supra. This is, of course, patently erroneous in that the "business use test" used in the Roland case has been repudiated and over-ruled by the 1949 amendment. This decision makes no mention, as they did in the Roberts case, as to whether or not the test used to classify the industry was the business use test.

It should also be kept in mind that the industry under consideration in the Roland case was a plant that manufactured, repaired and installed electrical generators for firms in interstate commerce. This activity is not even remotely related to the custom sheet metal industry.

In addition, if the test used in Goldberg v. Roberts, namely whether or not the pre-1949 status was due to an application of the repudiated business use test, was applied to this case, it would have to be held that the question of retail status is open and not determined by pre-1949 rulings. This is so in that the Roland case, supra, and Guess v. Montague, 140 F.2d. 500; Walling v. Thompson, 65 F. Supp. 686, are cases cited by the

administrator establishing that "industrial blacksmiths" "welding shops" are not retail in nature. These cases, without exception, arrived at this conclusion by an application of the repudiated "business use test."

On the other hand, in Wirtz v. Modern Trashmoval, Inc., Supra, the Fourth Circuit, the court asked the question as to whether or not the specific industry under consideration has ever been given a status prior to 1949.

> "In the absence of any prior determination classifying trash removal as within or outside the traditional retail concept, we are urged to consider modern activities analagous to those of other types of establishments considered inelligible for exemption in cases in an administrative regulation such as 29 CFR, Paragraph 779.317. The suggested approach was followed in Goldberg v. Sarvis, 294, Fed. 2d 841 (Third Circuit 1961), where the court decided that a 'shopping service,' whose employees posed as customers and evaluated the efficiency of clerks in retail establishments for the managements thereof, could not be a 'retail or service establishment,' because its service was similar to that of several types of establishments long considered by the administrator as ordinarily lacking in retail characteristics and because the service, a specialized one, which the public had no occasion to use, had never been recognized as a retail service. The secretary also contents that Modern's business is closely analagous to that of supplying janitorial services for offices and industrial establishments, a business recently held to be

outside the 'retail concept' in Goldberg v. Saf-T-Clean, Inc., 209 Fed. Sup. 343 (S.D. Fla. 1962), and Goldberg v. Eagle Maintenance and Supply Company, 197 Fed. Sup. 27 (S.D. Cal. 1961).

We agree that close and persuasive comparisons existed in Goldberg v. Sarvis, Supra, especially where the service offered had utility only to businessmen, and we note that the employees there involved, on occasion, crossed state lines to render services. However, in none of the types of establishments called to our attention do we find such similar characteristics as will compel us to hold that establishments offering and performing trash removal services in the manner shown by this record is beyond the 'retail concept'."

In other words, this court requires that the administrator had to have made a determination on the specific business involved. He would not be permitted to restrict the purpose of the exemption by the application of loose analogy. On the other hand, the Ninth Circuit classified the defendant's business as "machine shops and foundaries" "industrial blacksmiths" and "establishments engaged in reconditioning industrial tools." There is not even a close analogy between the custom sheet metal industry and those particular establishments. In addition, as stated above, the status of machine shops, foundries, industrial blacksmiths and establishments engaged in sharpening and reconditioning industrial tools were given their status as a result of an application of the "business use test."

III.

The question presented here is of grave importance to those businesses instituted and operated as a local business serving a small geographical area.

By the ruling the Ninth Circuit, the administrator may now take businesses that have no prior 1949 status and if he can find a similarity in any respect to that of a business having a status it is possible for him to place them altogether and deny a retail exemption to businesses deserving the same. While this court stated in the Kentucky Finance case, Supra., that the enactment was not meant to broaden fields of exemption, certainly the 1949 amendment was not intended by Congress to be administered in such a way that all businesses will not be allowed an exemption because they have, in some remote manner, a similar characteristic to a business given a status prior to 1949. The reasoning of the Fourth Circuit in Modern Trash Removal, Inc. is the better reasoned of the opinions and should be followed.

CONCLUSION

To protect the integrity of this Court's decision in the Callus and Zachry cases and to resolve a conflict between the decisions of the Ninth Circuit and the Fourth Circuit, and to allow businesses engaged in local activity to have the question of their retail status determined by the characteristics of their own individual businesses rather than by businesses not even re-

motely related to them, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO,
SOUTHERN DIVISION

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

vs.

HIGGINS, INC., a corporation,

Defendant.

No. 3743
MEMORANDUM
OPINION

By this action the Secretary of Labor seeks to recover unpaid overtime compensation alleged to be due three employees of defendant corporation under the Fair Labor Standards Act, 29 U.S.C. §201 et seq.

The facts are similar to those in the cases of Wirtz v. Idaho Sheet Metal Works, Inc., Nos. 3745 and 3752, decided this day, except for the following: during the period in question, this defendant sold a smaller portion of its goods (about 33 per cent) to processing plants; the firm had been located in the Burley, Idaho, area much longer than the Idaho Sheet Metal Works; the Higgins company had more counters and shelves, and sold a greater variety of its goods at retail; it had agency contracts with outside salesmen.

The Court's decision in the Idaho Sheet Metal Works

cases applies with greater force in this case, where the defendant is even more markedly a local enterprise.

Under the evidence herein, and the authorities cited in the Idaho Sheet Metal Works cases, the Court finds that plaintiff is not entitled to receive anything under and by virtue of his complaint.

Counsel for the defendant shall prepare Findings of Fact, Conclusions of Law and a proposed Judgment, and shall submit copies of the same to counsel for plaintiff and the originals to the Court.

Dated this 7th day of March, 1963.

FRED M. TAYLOR,
United States District Judge

APPENDIX B

"SEC. 3. As used in this Act—

"(j) 'Produced' means produced, manufactured, mined, handled, or any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

The relevant portions of Section 13 read as follows:

"SEC. 13(a). The provisions of sections 6 and 7 [the Act's minimum wage and overtime requirements] shall not apply with respect to * * *

"(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located * * *. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale, and is recognized as retail sales or services in the particular industry; or * * *

"(4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a re-

tail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided*, That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *."

In the Supreme Court of the United States

October Term, 1964

No. 754

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Appellant,

vs.

IDAHO SHEET METAL WORKS, INC., a Corporation,

Appellee.

Nos. 18,887
18,888

[Aug. 10, 1964]

Appeal from the United States District Court for the District of Idaho.

Before POPE, HAMLEY and MERRILL, Circuit Judges.

POPE, Circuit Judge.

The Secretary of Labor brought two actions in the court below for the purpose of enforcing compliance by the defendant Idaho Sheet Metal Works, Inc. with certain requirements of the Fair Labor Standards Act.[1] In one action the Secretary sought to enjoin further violations by the defendant of the overtime provisions of the Act.[2] In the other action the Secretary sought recovery of unpaid overtime compensation on behalf of one of the defendants' employees.[3] The two actions were consolidated for trial and after dismissal of the actions by the trial court, with prejudice, the appeals therefrom were consolidated for hearing in this court.

The facts here are undisputed. It is conceded that during the years 1959 through 1961, the defendant did not pay its employees, some twelve in number, in accordance with the overtime provisions of the Fair Labor Standards Act, and it is admitted that this practice has continued thereafter. It was stipulated that if recovery was had in the action to recover the employee's overtime compensation, recovery should be for the sum of $500 plus costs.

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[1]Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended by Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 29 U.S.C. 201, et seq. Other amendments of 1961 (75 State. 65) are not material here.

[2]Such injunction proceedings are authorized by Sec. 17 of the Act (29 U.S.C. Sec. 217).

[3]Such an action is authorized by Sec. 16(c) of the Act (29 U.S.C. Sec. 216(c)).

Upon the trial and in this court two questions were presented. The first question was whether any of the defendant's employees were engaged in the production of goods for commerce within the meaning of the Act. Since the record shows that the defendant's employees were engaged in the performance of work for its customers who were producing goods for interstate commerce, the query, stated more particularly, was whether defendant's employees were engaged in a "closely related process or occupation directly essential" to the interstate production of its customers.[1] The second question presented is whether the defendant is a retail establishment exempt from the requirements of the Act under Sec. 13(a).[2] The trial court found against the Secretary on both questions.

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[1]The section of the Act relevant in this regard is Section 3(j) which reads: "Sec. 3. As used in this Act—(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

[2]The relevant portions of Sections 13 read as follows: "Sec. 13(a). The provisions of sections 6 and 7 [the Act's minimum wage and overtime requirements] shall not apply with respect to * * * (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishments annual dollar volume of sales of goods or services is made within the State in which the establishment is located * * *. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale, and is recognized as retail sales or services in the particular industry; or * * * (4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a

During the years 1959 through 1961, the defendant was engaged in manufacturing, installing, maintaining and repairing equipment made of sheet metal for five large potato processors located in the general area of Burley, Idaho, where defendant's place of business was located. During that period 83 per cent of defendant's gross income was derived from those customers. In addition it performed comparable work for five other companies which were engaged in producing goods for interstate commerce including sugar mills, flour mills, seed and grain companies, and a container corporation. This accounted for an additional 3 per cent of defendant's gross income. The equipment which defendant fabricated or repaired for these companies included tanks of a capacity to hold 5,000 pounds of peeled potatoes, hoods for carrying off steam, and elevator buckets and chutes for transferring items within the plants.[*] During many weeks in those years the employees of defendant spent a substantial part of their total work

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retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: Provided, that more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *."

[*] The employees were sheet metal workers and they were employed at defendant's sheet metal plant which was a high ceilinged cinder-block building. The building was not equipped with any of the facilities common in a retail establishment in that it had no display windows, sales counters or cash registers. The equipment consisted of work benches and machinery for working on sheet metal. The metals used in the fabrication mentioned were primarily stainless steel, galvanized iron, black iron plate, aluminum and copper. The fabricated and installed equipment was not maintained in stock by the defendant but it was made to order in each case.

hours in these activities relating to the fabricating of equipment for the customers mentioned. A substantial portion of this work was carried on in the customer's plant.

In dealing with the question whether the defendant's employees were engaged in production of goods for commerce within the meaning of Sec. 3 (j) of the Act, the court, while finding in so many words that the defendant's business was "not closely related to nor directly essential to the production of goods for or in commerce,"[1] based its conclusion upon its finding that the defendant's "enterprise is a local business." The reasoning adopted by the trial court was that once it had determined that the employer was engaged in a "local business" it followed that his employees could not be engaged in the production of goods for commerce.

The trial court was led to this reasoning by its interpretation of the decision in Mitchell v. H. B. Zachry Company, 362 U.S. 310. While it is true that the opinion in that case contains certain references to "local business," to "activities of a dominantly local character," to "primarily local activities," and to "local production," we think that the trial judge was misled by the use of these phrases, and that, contrary to the trial court's opinion, the Zachry decision does not hold that

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[1]Note that so stated this is not precisely the question involved under the Act which states the important query to be whether "such employee was employed . . . in any closely related process or occupation directly essential to the production thereof, in any state." (Emphasis added.)

employment in "a local business" excludes it from being treated as employment in the production of goods for commerce.

The court below fell into the same error which led to the decision of the Court of Appeals for the Fourth Circuit in Mitchell v. Lublin, McGaughy & Assoc., 250 F. 2d 253, 259. In that case the employees involved were draftsmen, field clerks and stenographers employed by an architectural firm. All of these employees worked with plans and specifications prepared by their employer for the repair and construction of various interstate instrumentalities including air bases, roads, radio and television installations. The Court of Appeals held that "the defendants in this case were independent engineers and architects engaged in essentially local activity in each of the offices which they maintained." Referring to the fact that the firm sent telegraph messages, and used the mails to transmit documents to other states, the court said (pp. 259-260): "[W]here the business is essentially local and there is no production of 'goods,' communication which is merely incidental to the local enterprise cannot be classed as commerce. . . . [T]he Act does not attempt to regulate local activity. . . . [T]he architectural work itself was local and of necessity gave color to the activities of their subordinates and took them outside the scope of the statute." After grant of certiorari this judgment of the Court of Appeals was reversed, Mitchell v. Lublin, McGaughy & Asso., 358 U.S. 211. The Supreme Court noted that the decision of the lower court was based upon its conclusion that the activities of the employing

firm were "local in nature." It held, however, that in order to determine whether these employees were engaged in commerce "we focus on the activities of the employees and not on the business of the employer." Said the Court (p. 212): "The test is 'whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interestate commerce as to be, in practical effect, a part of it, rather than isolated, local activity.' . . . . Respondent contends that *its* activities are essentially local in nature. But as we stated, Congress deemed the activities of the individual employees, not those of the employer, the controlling factor in determining the proper application of the Act. Here the activities of the employees show clearly that they are 'engaged in commerce' and thus are eligible for the protections afforded by the Act."

It is important to note that in the language just quoted the Supreme Court first inquired whether the work of the employees is "directly and vitally related to the functioning of an instrumentality or facility of interstate commerce." If that question is answered in the affirmative then it can be said that the enterprise is not a local activity. It is obvious that the Court of Appeals in that case, as did the court below in this case, began its inquiry at the wrong end by first asking whether the enterprise was a "local activity." As the Supreme Court in the Lublin case, above, made clear, that is in nosense the test.

In the Zachry case, supra, upon which the trial court relied, the respondent employer was a construction

contractor employed to construct a dam for impounding water for a water district to supply water to the City of Corpus Christi. An unspecified amount of the water supplied by the district was consumed by facilities and instrumentalities of commerce. It was plain here that neither the city nor the district was engaged in the production of goods for commerce. The Court held in that case "neither a facility of 'commerce' nor a facility of 'production' is under construction. Operation of the completed dam will merely support production facilities; and construction of the dam is yet another step more remote." (p. 319) Thus the decision is based upon the Court's finding of the remoteness of the construction from any facility of commerce or of production that might be within the terms of the Act, and not upon any finding that the construction work was of "a local character."* In setting forth the test to be applied in a case of this kind the Court made it plain that an answer to the problem presented cannot be predicated upon a finding as to whether the enterprise carried on by the employer is local or otherwise. The Court alluded to (p. 315) "the governing principle that coverage turns upon the nature of the employees' duties, and not upon the nature, local or interstate, of the employer's general business."

A Supreme Court case whose facts most closely re-

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*After finding the construction to be too remote from any production of goods for commerce to be either "closely related" or "directly essential" to production, it was not inappropriate for the Court to conclude that it was dealing with something which had a "local character".

semble those in the case now before us is Roland Co. v. Walling, 326 U.S. 657 (1949). Roland Co. was engaged in manufacturing, installing, and servicing electrical motors, generators, etc. A substantial portion of its business was done with companies directly engaged in interstate commerce. During practically every work week Roland's mechanics did some of this work for some of these customers, either in the repair of their motors or generators, in the reconstruction of used motors sold to them, or in performing electrical work at their establishments. It was held that these employees were engaged in the production of goods in interstate commerce and that they were within the coverage of the Act.

The court below declined to follow the Roland case on the ground that the 1949 amendment of the Act[2] undercut its authority, holding that the later case of Zachry, supra, disclosed that the Roland case was no longer good law.

In a later portion of this opinion we shall have occasion to point out the very limited effect which the 1949 amendment had with respect to the authority of Roland. The legislative history of the 1949 amendment shows beyond doubt that the holding in Roland that

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[2]In 1946 Sec. 3(j) instead of referring as at present, to "any closely related process," etc., used the words "*any process or occupation necessary to the production thereof* in any state." By the 1949 amendment the italicized words just quoted were changed to the language of the Act which now reads 'any closely related process or occupation directly essential to the production thereof in any state."

those employees were engaged in the production of goods in interstate commerce and were within the coverage of the Act, would not be affected by the 1949 amendment. During the discussion of the amendment on the floor of the Senate, Senator Holland, the main sponsor of the amendment, answering a question whether Roland would "be decided any differently under the proposed amendment," answered "definitely not." (95 Cong. Rec. 12505.) And in connection with the Conference report on the bill, the House Managers reported: "The bill as agreed to in conference also does not affect the coverage under the act of employees who . . . make, repair or maintain machinery or tools and dies used in the production of goods for commerce. . . . All the employees mentioned in this paragraph are doing work that is closely related and directly essential to the production of goods for commerce." (Conference Report, Statement of the House Managers, U.S. Code & Cong. Serv., 91st Cong., 1st Sess. p. 2253.)

This brings us to the question which, as indicated in the Lublin case, supra, must be answered to resolve the first point presented here. We inquire whether the work of these employees of defendant was "so directly and vitally related to the functioning" of these potato processors, sugar mills, etc., as to be in practical effect a part of those interstate enterprises. In the words of the Act, the inquiry is whether these employees were engaged "in any closely related process or occupation directly essential" to the production which was carried on by the potato and sugar processors, etc., previously

mentioned. We think it is plain that the answer must be in the affirmative.

As we have indicated above, the trial court, besides holding that these employees were not covered by the Act, held also that defendant was exempt from the Act's minimum wage and overtime requirements by reason of its being recognized as an establishment engaged in retail sales or services in the industry.[10] It is plain that this finding of the court was predicated upon testimony which defendant offered to the effect that within the industry the defendant's business was and is considered to be retail. We think that such is not an appropriate basis upon which to determine whether the retail exemption applies to the defendant in this case. In Mitchell v. Kentucky Finance Co., 359 U.S. 290, the defendant had succeeded in the Court of Appeals in maintaining its assertion of the retail exemption on the ground that "their activities are recognized in the financial industry as being 'in the retail end' of the industry." In reversing the decision of the Court of Appeals, the Supreme Court made it plain that even though an establishment's activities might be recognized as being retail in the particular industry, the establishment does not come within the meaning of the

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[10]The court's opinion stated as follows: "The Court finds from the evidence that all of defendant's sales were within the State of Idaho and its products were not sold for resale. The Court also finds from the evidence that the business conducted by defendant was and is considered to be retail within the industry as shown by the testimony of the manager of defendant corporation and representatives of companies selling materials to defendant."

retail exemption unless its business falls within the "retail concept" of the Act. We had occasion to note this in Goldberg v. Roberts, 9 cir., 291 F. 2d 532, 534. As we there said: "If by its nature appellee's business is 'outside the retail concept' the Sec. 13 exception cannot apply."

The trial court here decided that defendant's business was within the retail concept in the following manner: It noted that in Roland, supra, the Supreme Court had held that concern outside the retail concept. There the Court said (p. 666): "[T]he exemption reaches employees of only such retail or service establishments as are comparable to the local merchant, corner grocer or filling station operator who sells to or serves ultimate consumers who are at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach." It seems obvious that if the tests applied in the Roland case are applied here, we must conclude that the defendant is not within the retail exemption.

The trial court disregarded the Roland test stating that the retail concept described in Roland "was repudiated by the 1949 amendment to the Act", citing Mitchell v. Kentucky Finance Co., supra. But the latter case shows that the 1949 amendment served no such purpose. The Roland case had indicated approval of a rule to the effect that sales of goods or service for "business use" were not retail. The Kentucky Finance case shows, as does the legislative history of the 1949 amendment, that the sole purpose of that amendment was to do away with this "business use" test. The Court said:

"We find nothing in the debates or reports which suggests that Congress intended by the amendment to broaden the fields of business enterprise to which the exemption would apply. Rather it was time and again made plain that the amendment was intended to change the prior law only by making it possible for business enterprises otherwise eligible under existing concepts to achieve exemption even though more than 25 percent of their sales [were not retail under the old business use test]." 359 U.S. at 294. To the same effect see Goldberg v. Roberts, supra. That the 1949 amendment had this limited effect is clear from the legislative history of that amendment."

When we consider all the facts in the present case, the operation in a factory-like building equipped only for manufacture and repair of the fabricated metal products, with a substantial portion of the time of its employees devoted to fabricating large metal equipment for use by potato processors, sugar mills and similar enterprises, we cannot agree that the enterprise fell within the retail concept described and referred to in these decisions.

"Representative Lesinski, one of the Managers for the House, referring to a reference to Roland in the House Managers' Statement, stated that this reference "should not mislead anyone into concluding that the conference intended to reverse or nullify that decision" (95 Cong. Rec. 14942).

The Senate Conferees' report stated that the amendment did not change the status of establishments "selling industrial goods and services to manufacturers engaged in the production of goods for interstate commerce and to other industrial and business customers (such as the establishment in Roland Electrical Co. v. Walling, (326 U.S. 657)." (95 Cong. Rec. 14877.)

In addition we should note that the 1949 amendments to the Act recited that prior rulings by the Administrator with respect to enterprises within or without the retail exemption should remain in effect unless inconsistent with the statute as amended. In his 1942 Wage and Hour Manual, p. 326, secs. 29-31, the Administrator listed types of business which were outside the retail exemption and which were similar to the business of the defendant. Among these were "machine shops and foundries", "industrial blacksmiths" and "establishments engaged in sharpening and reconditioning industrial tools."

We hold that the defendant was not engaged in business within the retail exemption provisions of Sec. 13 of the Act.

The judgments are reversed and the causes remanded with direction to enter judgments for the appellant.

FILED
DEC 11 196
JOHN F. DAVIS, CL

In the Supreme Court of the United States

October Term, 1964

No. [redacted] 30

ADDENDA—APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Appellant,

vs.

No. 18,887

IDAHO SHEET METAL WORKS, INC., a corporation,

Appellee

Appeal from the United States District Court for the District of Idaho.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded

to the said District Court with direction to enter judgment for the appellant.

DEC 11
JOHN F. DAV

Filed and entered Aug. 10, 1964.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Appellant,

vs.

No. 18,888

IDAHO SHEET WORKS, INC., a Corporation,

Appellee

Appeal from the United States District Court for the District of Idaho.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court with direction to enter judgment for the appellant.

Filed and entered Aug. 10, 1964.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 754

IDAHO SHEET METAL WORKS, INC., PETITIONER

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals in these consolidated actions (Nos. 18887 and 18888 in the court of appeals) (App. C to Pet.) is reported at 335 F.2d 952. The findings, conclusions and opinion of the district court (1 R. 52-57, 58-61; 2 R. 18-23, 24-27)[1] are not reported.[2]

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[1] The references 1 R, 2 R. and 3 R. are to the respective volumes of the transcript of the Record filed in this Court.

[2] The district court opinion reproduced in Appendix A, pp. 18-19, of the petition is not an opinion in this case, but in a

JURISDICTION

The judgments of the court of appeals (1R. 83-84) were entered on August 10, 1964. A timely petition for rehearing was denied on September 15, 1964 (1 R. 85-95). The petition for a writ of certiorari was filed on December 11, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether employees who regularly fabricate, install and repair sheet metal equipment for use in customers' manufacturing plants in the production of goods for interstate commerce are engaged in the production of goods for commerce within the coverage of the Fair Labor Standards Act.

2. Whether a sheet metal plant engaged primarily in fabricating, installing and repairing equipment for customers' manufacturing plants is a "retail or service establishment" within the exemption provided by Section 13(a)(2) and (4) of the Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended by the Fair Labor Standards Act Amendments of 1949, 63 Stat. 910, and by the Act of May 5, 1961, 75 Stat. 65 (29 U.S.C. 201, *et seq.*), are printed in the petition for certiorari (Pet. 20-21).

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similar case, *Wirtz* v. *Higgins, Inc.*, which, by agreement of the parties, was disposed of on appeal in accordance with the decision of the court of appeals in the present case.

STATEMENT

This case involves two consolidated actions brought by the Secretary of Labor under the Fair Labor Standards Act—one seeking an injunction under Section 17 of the Act to restrain further violations by petitioner of the Act's overtime requirements, and the other instituted under Section 16(c) to recover unpaid overtime compensation on behalf of one of petitioner's employees. Petitioner admittedly did not pay its employees in accordance with the overtime requirements of the Act (1 R. 27, 42-43). It contended, however, that the employees were not within the coverage of the Act and that, in any event, the business was a "retail or service establishment" entitled to exemption under Section 13(a)(2) and (4) of the Act (1 R. 8-9).

1. Petitioner operates a plant in Burley, Idaho, where it employs some twelve workers in fabricating, installing and repairing sheet metal products (1 R. 30; 3 R. 31-35, 44; App. C, p. 4). Although petitioner does some fabrication work for small businesses and individuals, and, as an "incidental," sells small stock items (3 R. 45), about 83% of its gross income during the years 1959 through 1961 ($563,035 out of a total of $673,808) was derived from the fabrication, installation and maintenance of equipment for five large potato processors in the Burley area (1 R. 31-36; App. C, p. 4). Petitioner's employees, during many workweeks, spent a substantial part of their time working on equipment—such as vats, storage tanks, elevator buckets, and chutes—

which is made to order in accordance with the plans and specifications of the particular processor and used in the production of dehydrated and frozen potatoes for interstate shipment (1 R. 31-36; App. C, p. 4). Some of this work, both fabrication and installation, was performed in the customers' plants, and on such occasions, petitioner's employees would work alongside the customers' employees, under the same supervision (3 R. 23-24; App. C, p. 5).

In addition to the 83% of its income derived from the work for the five potato processors, petitioner derived another 3% of its income from comparable work performed for five other interstate producers engaged in the manufacture or processing of sugar, flour and millfeed, seeds and containers (1 R. 36-39; App. C, p. 4).

2. Petitioner's claim to exemption as a "retail or service establishment" under Section 13(a)(2) and (4) of the Act rested upon the testimony of its lawyer-accountant, its general manager, its president and two salesmen who sell metal products to it (3 R. 67-97), to the effect that they considered establishments such as petitioner's to be "custom retail and service establishments" (3 R. 73). The lawyer-accountant explained that his view was based on the belief that such establishments evolved from the "early tin shop" found in hardware stores around 1900 (3 R. 68-72), although he acknowledged that there are "marked differences" between petitioner's operation and that of the traditional tin shop, in that the former is "immensely larger" and its product "larger in size and much higher in price" (3 R. 75). Petitioner's presi-

dent testified that he regarded his business as "retail" because "[e]very job we do is to the customer's specific recommendations and to his personal use" (3 R. 50), and because 60% of his sales (in number, not in dollar volume) is to "the general public" as distinguished from industrial customers (3 R. 64-65). The other three witnesses gave no explanation of the basis for their views (3 R. 80, 89-90, 94-95).

3. The district court upheld petitioner's contention that the work performed for the interstate producers did not bring its employees within the Act's coverage, citing *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310 (1 R. 54-55). It also sustained petitioner's claim to exemption as a "retail or service establishment" on the basis of its finding that petitioner's business was so recognized in the industry "as shown by the testimony of the manager of defendant corporation and representatives of companies selling materials to defendant" (1 R. 56, 61). It declined to follow this Court's decision in *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, noting that its description of the "retail concept" was "repudiated by the 1949 amendment to the Act" (1 R. 56).

The court of appeals reversed on both issues (App. C). On the coverage issue, it relied on the *Roland* decision and on legislative history showing "beyond doubt that the holding in Roland that those employees were * * * within the coverage of the Act, would not be affected by the 1949 amendment" (App. C, pp. 9-10).

On the exemption question, the court, citing *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, treated as irrelevant the testimony of petitioner's witnesses to the effect that the business was considered "retail" in the industry, and ruled instead that the case was governed by the holding in *Roland* that the exemption is not applicable to the business of selling industrial goods and services to manufacturers producing goods for commerce. On the basis of the legislative history, the court below further noted that the 1949 amendment was not intended to repudiate the *Roland* holding, or to extend the traditional "retail concept" to types of businesses not previously covered by it, but merely to do away with the "business use" test whereby any sale of goods or services for use in the customer's business was *ipso facto* deemed non-retail. The court concluded that petitioner's business, like the similar enterprise in *Roland* and like the small loan business in *Kentucky Finance*, *supra*, was "outside the retail concept" of the Act independently of the rejected "business use" test, and, therefore, could not be classified as retail under the 1949 amendment.

ARGUMENT

The decision below, on both the coverage and exemption issues, correctly applies the governing principles and is in accord with the Congressional intent as disclosed by the relevant legislative history. On the coverage issue, the decision is not in conflict with that of any other court of appeals and presents no problem warranting review by this Court. On the ex-

emption issue, however, there is a fundamental conflict between the present decision and the decisions of the Fourth and Sixth Circuits, respectively, in *Wirtz* v. *Modern Trashmoval, Inc.*, 323 F. 2d 451, certiorari denied, 377 U.S. 925, and in *Wirtz* v. *Steepleton General Tire Company, Inc.*, 330 F. 2d 804, in which a petition for writ of certiorari, filed on behalf of the Secretary of Labor, is now pending before this Court (No. 755, this Term). Accordingly, on the exemption issue, we do not oppose the granting of the writ.

1. *Coverage.* The decision below is supported by this Court's decisions in *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; and *Borden Co.* v. *Borella*, 325 U.S. 679, and is entirely consistent with *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310, and *10 East 40th Street Company* v. *Callus*, 325 U.S. 578. Far from being "squarely in conflict" with the decision below (Pet. 7), the *Roland*, *Kirschbaum* and *Borden* decisions plainly establish that employees making, maintaining, or repairing equipment for direct use in production facilities producing goods for interstate shipment are within the Act's coverage. Those decisions also make clear that such employees are covered whether they are employed by the interstate producer himself or by an independent establishment serving both interstate and local uses.

The *Roland* decision (as well as *Kirschbaum*, *Borden* and others to similar effect) was specifically approved in the Senate conference report explaining the 1949 amendment to the Act's definition of "pro-

duced"[3] (95 Cong. Rec. 14874-14875); and both the House and Senate reports expressly confirmed the Congressional intent that the amended language would continue to cover employees who, like those in the instant case, make, repair or install "machinery or tools" used in the production of goods for commerce, or who repair, maintain, improve or enlarge "equipment, or facilities of producers of goods," "whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer" (95 Cong. Rec. 14875, 14928-14929).

The other two decisions of this Court which petitioner asserts to be in conflict with the decision below are patently inapposite. *10 East 40th Street Bldg. Co.* v. *Callus*, 325 U.S. 578, dealt with maintenance employees who were not serving production facilities at all, but rather an office building in which office space was leased to a miscellany of tenants. In *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310, 319, holding that employees engaged in constructing a new dam to augment a municipal water supply system were not covered by the Act, this Court explicitly pointed out that the employees were working on

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[3] The definition appears in Section 3(j), quoted in full at p. 20 of the Petition. Before the amendment, the pertinent portion read: "for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in * * * *any process or occupation necessary to the production thereof*, in any State." (Emphasis added.) The 1949 amendment changed the italicized words to read: "or in any closely related process or occupation directly essential to the production thereof * * *."

"neither a facility of 'commerce' nor a facility of 'production'."

2. *Exemption Issue.* Contrary to petitioner's contention (Pet. 10-13), the decision below is not only consistent with, but indeed is compelled by, this Court's decision in *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290. We acknowledge, however, that the interpretation of the industry-recognition clause which underlies the decision below appears to be in conflict with that adopted by the Fourth and Sixth Circuits in the *Modern Trashmoval* and *Steepleton* cases, supra, p. 7. In those cases, "recognized as retail" was construed to mean "labeled as retail," rather than "treated (functionally) as retail;" and the availability of the exemption was thus made to turn upon the way in which the word "retail" was defined in the glossary of terms used in the particular industry (see the government's petition for certiorari in *Steepleton*). Here, by contrast, the Ninth Circuit held that "testimony * * * to the effect that within the industry the defendant's business was and is considered to be retail" was "not an appropriate basis upon which to determine whether the retail exemption applies * * *." (App. C, p. 11). As we stated in our petition in the *Steepleton* case, the question of construction which divides these courts of appeals is of fundamental importance and warrants resolution by this Court. Accordingly, we do not oppose the granting of the writ limited to the exemption issue.

CONCLUSION

There is no occasion for further review on the coverage issue. However, in view of the importance of the exemption issue (see our petition in *Steepleton*, pp. 11-13) and the need for resolving the conflicting interpretations of the industry-recognition clause, we do not oppose the granting of the writ on the exemption issue.

Respectfully submitted.

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JANUARY 1965

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OFFICE COPY

IDAHO SHEEP [illegible]

Petitioner,

vs.

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [illegible] CIRCUIT

BRIEF FOR THE PETITIONER

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29 C.F.R. Par. 779.317 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 754

IDAHO SHEET METAL,

Petitioner,

vs.

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States District Court in and for the District of daho, Southern Division, entered March 7, 1963, is not reported (R. 87). The opinion of the Court of Appeals for the Ninth Circuit, entered August 10, 1963, is reported as W. Willard Wirtz, v. Idaho Sheet Metal Works, Inc., 335 Fed. 2d 952. (98 through 109)

JURISDICTION

The judgment of the United States Court of Appeals, Ninth Circuit, was entered on August 10, 1964 (R. 109). A timely petition for rehearing was denied on September 15, 1964, the day after its filing (R. 117). The Petition for a Writ of Certiorari was filed on December 11, 1964, and was granted on March 1, 1965. (R. 118, 119) The jurisdiction of this Court is invoked under 28 USCA 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Appeal involves the provisions of the Fair Labor Standards Act of 1938, C.676, 52 Stat. 1060, as amended by the Act of 1949, C.736, 63 Stat. 910, 29 USCA 201, et sec.: Section 13 (a) (2) Section 13 (a) (4). These provisions are reprinted in Appendix A, infra.

QUESTION PRESENTED

Is the Petitioner's business operation a retail establishment and entitled to the exemption as such, under Section 13 (a) of the Fair Labor Standards Act?

STATEMENT OF THE CASE

These are two actions brought by the Secretary of Labor under the Fair Labor Standards Act. (R. 1,

5). Section 17 of the Act authorizes the District Courts of the United States to restrain violations of the Act, while Section 16 (c) authorizes the Secretary of Labor to bring suit on behalf of the employees to recover amounts due under Sections 6 and 7, Minimum Wage and Over-time Provisions of the Act. Accordingly, Cause No. 1887 was brought by the Secretary, pursuant to Section 17 to enjoin alleged further violations by Petitioners of the Act's overtime provisions, while cause No. 1888 was instituted under Section 16 (c), to recover unpaid overtime compensation on behalf of one of the Defendant's employees, William B. Coombs. (record 1, 5). The two actions were consolidated for trial, at the conclusion of which the District Court held Petitioner's employees were not within the coverage of the Act, and, further, that Petitioner's enterprise was a retail establishment and therefor exempt (record 11, 87, 88, 89, 90, 91). Appeal was taken to the United State Court of Appeals, Ninth Circuit.

The Court of Appeals for the Ninth Circuit reversed the judgment of the District Court and remanded the case to the District Court to enter judgment on behalf of the Respondents. (R.109).

On March 1, 1965, this Court entered its Order permitting Certiorari directed to the question as to whether or not the employer's shop is a retail establishment and entitled to the exemption as such,

under Section 13 (a) of the Fair Labor Standards Act. (R. 118, 119)

The Petitioner in this case operates a custom sheet metal shop in a small agricultural town, Burley, Idaho. The shop was built in 1957 and was established for the purpose of serving local community's needs in the custom, fabricating and making of sheet metal or tin items to be sold or installed for the general public, including merchants, farmers, individuals and in some instances, manufacturers (R. 50, 51, 52, 54, 55, 57, 58, 59, 63) The products were all made and sold at a retail price computed by adding a profit, cost of labor and materials (R. 55, 56) The shop was, and is, an enlarged projection of the old-time tin shop and is described by the manufacturing salesmen in the industry as a retail outlet (R. 58, 59, 60, 61, 64, 65, 52)

Some time after the shop was established, seasonal manufacturers of frozen food products located in the community, and intermittently at irregular intervals, usually during the "down" periods, used the facilities of the Defendant for the installation of items such as air ducts, air conditioning equipment, storage tanks, elevator buckets, endless conveyor belts, conductors and chutes. (R. 57, 16, 14, 12)

The shop and building is equipped with a counter, work benches, and racks for display and storage of products, such as sheet metal, tubing, tin and other objects (R. 52, 63, 64, 65).

ARGUMENT

I.

THE RECORD IN THIS CASE SHOWS THAT THE PETITIONER MEETS ALL OF THE STATUTORY TESTS FOR BEING A RETAIL SERVICE ESTABLISHMENT.

Section 13 (a) (2) and (4 of the Fair Labor Standards Act requires that the exemption be afforded industries who meet the following tests:

(1) At least 50% of the establishment's annual dollar volume of sales must be made within the State in which the establishment is located.

(2) At least 75% of the establishment's annual dollar volume of sales must be to purchasers who do not buy for resale.

(3) At least 75% of the establishment's annual dollar volume of sales must be recognized in the particular industry as retail sales.

(4) The establishment must be recognized as a retail establishment in the particular industry.

(5) The goods which the establishment makes or processes must be made or processed at the establishment which sells them.

(6) More than 85% of the establishment's annual dollar volume of sales of goods which it makes or processes must be made within the state within

which the establishment is located. (Appendix A, infra)

Respondent conceded at the pre-trial that Petitioner meets requirements (1), (2), (5) and (6). (R. 24)

The undisputed testimony in this case indicates that not only 75% of the establishment's annual dollar volume of sales are recognized as retail sales, but that all sales are recognized as such. (R. 60, 61, 63, 64, 55, 56) The testimony shows that the method of determining the price for any custom-built item, or, for that matter, any item is determined on the basis of a retail price, Certainly, if it is not for resale as stipulated (R. 24), and it is computed on the basis of a retail price, all sales of Petitioner are retail sales.

The undisputed evidence in this case also indicates that requirement (4) has been met, in that the establishment is considered and recognized as a retail establishment within the custom sheet metal industry. (R. 59, 60, 61, 64, 65, 66)

II.

PETITIONER'S BUSINESS ESTABLISHMENT OR A CUSTOM SHEET METAL SHOP IS NOT OUTSIDE THE TRADITIONAL RETAIL CONCEPT.

This Court in *Mitchell v. Kentucky Finance Co.*, 359 US 290, interpreted the 1949 amendments to the

Fair Labor Standards Act in such a way as to impose an additional requirement, namely, that the industry under consideration be considered retail under traditional concepts. This "traditional concept" was determined by whether or not the particular business under consideration had ever in the past been classified by the Courts or the Administrator as non-retail in character.

> "We find nothing in the debates or reports which suggests that Congress intended by the amendment to broaden the field of business enterprise to which the exemption would apply. Rather, it was time and again made plain that the amendment was intended to change the prior law only by making it possible for business enterprises otherwise eligible under existing concepts to achieve exemption even though more than 25% of their sales were to other than private individuals for personal consumption, provided those sales were not for resale and are recognized in the field or industry involved as retail."

359 US 294

Before the Court may turn to the statutory requirements of 13 (a) (2) and (4), this additional test must be met concerning the industry's prior status as retail or non-retail. The holding in the *Kentucky Finance Case*, supra, imposes two addi-

tional issues which must be decided on the basis of the record and applicable case law. The first is, what is the Petitioner's business and what are its characteristics and, secondly, once the business has been characterized and defined has it been awarded a retail or non-retail status.

The transcript in the District Court and the witnesses testifying clearly established that the industry under consideration is called the "custom sheet metal industry." (R. 58, 59) The custom sheet metal industry serves the public in an area not covered by the hardware store which is undisputedly retail and the manufacturer of sheet metal products which manufactures according to set forms and on a production line basis. This industry serves that portion of the general public wanting one specific item, large or small, made according to their specifications and order. (R. 58, 59, 60, 61)

Since the record shows the name and characteristics of the industry under consideration, namely the custom sheet metal industry, it must be determined on the basis of the *Kentucky Finance case*, supra, whether or not this industry has been categorized as retail or non-retail in character. Throughout the trial and briefing in this case, the Government has consistently taken the position that based upon the interpretative bulletins which recognize "machine shops" "industrial blacksmiths" "establishments engaged in reconditioning industrial tools," and "establishments engaged in resistance welding,"

as being non-retail in nature that the custom sheet metal industry is also non-retail in nature. However, the record does not indicate at any place where the custom sheet metal industry is in any way analogous to these broad industrial definitions. The Government wholly fails to show any analogy whatsoever between the custom sheet metal industry and "establishments engaged in resistance welding." In the absence of any showing as to why the custom sheet metal industry is identical to the industries above named, the test of the *Kentucky Finance case*, supra, on pre-determined retail status has been met.

In *Wirtz v. Modern Trashmoval, Inc.*, 323 Fed. 2d 451 (4th Circuit - 1963) the Fourth Circuit Court ruled that a corporation engaged exclusively in the collection and disposal of garbage, rubbish, debris and industrial waste, was entitled to the exemptions under 13 (a) (2) and (4) of the Fair Labor Standards Act. In arriving at this conclusion, the Fourth Circuit Court was faced with a problem similar to the situation presented here.

The Fourth Circuit notes on page 465 of its decision that the rulings of the Administrator have not classified the trash removal industry as ineligible for lack of a "retail concept." The Administrator in that case urged, as they have in this case, that the Defendant's activities are closely analogous to those other types of establishments considered as ineligible for exemption, in cases and administrative regula-

tions noted in 29 CFR Par. 779.317.

However, the Fourth Circuit discarded this method of determining whether or not an establishment is retail in nature and determined the question solely on the basis of the record before it and traditional concepts.

In the *Trashmoval case*, supra, the court stated: "We agree that close and persuasive comparisons existed in *Goldberg v. Sorvas*, supra, especially where the service offered had utility only to business men, and we note that the employees there involved, on occasion, crossed state lines to render the service. However, in none of the types of establishments called to our attention do we find such similar characteristics as would compel us to hold that an establishment offering and performing trash removal services in the manner shown by this record is beyond the 'retail concept.'

"In determining whether or not a business activity is a 'retail or service establishment' within the meaning of the section 13 (a) (2) exemption, we think the most satisfactory approach is to examine the facts of record as to the nature and conduct of its business in the light of general criteria developed under the Act since its enactment in 1938." Page 465-466.

In other words, if there has been no prior determination by the Courts or Administrator on the retail or non-retail status of the business presently before the Court, the retail status is to be decided not by haphazard attempts to fit the business under consideration into some other wholly unrelated business enterprise, but rather by looking at the facts in the record; its business characteristics, and based upon these factors to determine whether or not it does, in effect, constitute a retail establishment. The Fourth Circuit looked to whether or not numerous sales were made by the establishment. Whether or not the services are offered to the general public in a limited geographical area at uniform rates with no discounts similar to wholesale sales. Whether or not there is any requirement of minimum service from each customer, or any quantity discounts. Whether or not there is any requirement that the customer have status as a manufacturer, retailer or other commercial entity before service will be rendered to them. It was also pointed out that the trash removal business constitutes the "end of the stream of distribution" type of operation. 323 Fed. 2d 465, 466. These tests were approved and applied in *Wirtz* v. *English, dba English Oil Service*. 339 Fed. 2d, 691 (10 Cir. 1965)

The similarities between the custom sheet metal industry and what the Fourth Circuit felt was important in determining whether or not an estab-

lishment has a "traditional retail concept," are striking. The record in this case establishes very clearly that the service is offered to the general public in a limited geographical area at uniform rates, with no discounts. (R. 55, 56, 57). The record indicates that the sales of the Petitioner herein are on a standard basis to everyone with no quantity discounts. The record also clearly establishes that sales are made to the general public, with no requirement as to its customer being a manufacturer, retailer or other commercial entity (R. 51, 52, 54, 56, 57).

In addition, the Pre-Trial Order stipulated that 75% of the Defendant's annual dollar volume of sales of goods or services, or both, are not for resale. (R. 24). This clearly places the Petitioner's business at the "end of the stream of distribution." The record also establishes beyond question that for the specialized service rendered by the Petitioner, namely, custom sheet metal work, all their sales and services are to the ultimate consumer of the same and at retail. (R. 60, 54).

III.

THE NINTH CIRCUIT COURT OF APPEALS APPLIED THE "BUSINESS USE TEST" IN CLASSIFYING PETITIONER'S BUSINESS AS BEING TRADITIONALLY NON-RETAIL.

The Ninth Circuit in the case presently before this Court and cited as *Wirtz v. Idaho Sheet Metal Works, Inc.*, 335 Fed. 2d 952 (Ninth Circuit 1964) employed the following language in determining that the Petitioner's business was outside the "retail concept."

"The trial court here decided that Defendant's business was within the retail concept in the following manner: It noted that in *Roland*, supra, the Supreme Court had held that concern outside the retail concept. There the court said (326 US p. 666, 66 S.Ct. p. 417):

" '(T)he exemption reaches employees of only such retail or service establishments as are comparable to the local merchant, corner grocer or filling station operator who sells to or serves ultimate consumers who are at the end of, or beyond, that "flow of goods in commerce," which it is the purpose of the Act to reach.' *It seems obvious that if the tests applied in the Roland case are applied here, we must conclude that the defendant is not within the retail exemption.* (Emphasis ours).

"The trial court disregarded the Roland test stating that the retail concept described in Roland 'was repudiated by the 1949 amendment to the Act,' citing *Mitchell v. Kentucky Finance Co.*, supra. But the latter case shows that the 1949 amendment served no such purpose. The

Roland case had indicated approval of a rule to the effect that sales of goods or service for 'business use' were not retail. The *Kentucky Finance* case shows, as does the legislative history of the 1949 amendment, that the sole purpose of that amendment was to do away with this 'business use' test.' * * *"

Wirtz v. Idaho Sheet Metal Works, Inc., 335 Fed. 2d 956, at 957.

The only test used in the *Roland case*, supra, which was overruled by the 1949 amendment, was whether or not the sales or services were to a person for his own personal use or were to be used by a commercial or business user. If the latter, they were not a retail sales, if the former, they were considered a retail sale. (326 US 667)

In addition, on page 957 of the Ninth Circuit decision, they attempted to pigeonhole the custom sheet metal industry with such totally unrelated businesses as machine shops and foundries, industrial blacksmiths and establishments engaged in sharpening and reconditioning industrial tools. It is respectfully submitted that the reasoning of the Fourth Circuit should be applied, and unless the specific industry under consideration here, the custom sheet metal industry, has not had a prior determination as to its status, we must refer to the record and from the record determine whether there

is a retail concept. Since there has been no prior administrative ruling or court decision classifying the custom sheet metal industry, and since the evidence shows sales to the general public at the "end of distribution," it is respectfully submitted that the Petitioner's business is not outside the retail concept.

Petitioners urge that the holding of the *Kentucky Finance case*, supra, does not require the courts, in all instances, to decide the retail status of an industry based upon whether or not it has business characteristics in some way similar to an industry already determined. If the Administrator is permitted to classify business enterprises seeking retail exemption as non-retail on the basis of loose analogy every industry seeking exemption will have its status determined preliminarily and on the basis of other industries remotely similar to it rather than on the provisions of 13 (a) (2) (4) of the F.L.S.A. It would appear obvious that this was not the intent of Congress in amending section 13 (a) in 1949.

It is respectfully urged that the *Kentucky Finance case*, supra, requires only that the courts look to whether or not the *particular* business under consideration has been classified as retail or non-retail. If it has not and it has retail characteristics as the petitioner's business has in this case, then the requirements of 13 (a) (2) and (4) should be applied. This procedure if followed in this case, as it was in

the *English* and *Trashmoval* cases, supra, will best reflect the intent of Congress and without question establish the petitioner business as retail.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed, and the case remanded to the United States District Court for the District of Idaho, with directions to grant Petitioner's motion to dismiss.

Respectfully submitted,

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APPENDIX A

The relevant portions of Section 13 read as follows:

"SEC. 13(a). The provisions of sections 6 and 7 [the Act's minimum wage and overtime requirements] shall not apply with respect to * * *

"(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located * * *. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale, and is recognized as retail sales or services in the particular industry; or * * *

"(4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided*, That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *."

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 30

IDAHO SHEET METAL WORKS, INC., PETITIONER

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (R. 98–108) is reported at 335 F. 2d 952. The findings, conclusions, and opinion of the district court (R. 87, 92) are not reported.

JURISDICTION

The judgments of the court of appeals (R. 109, 110) were entered on August 10, 1964. A timely petition for rehearing was denied on September 15, 1964 (R. 117). The petition for a writ of certiorari was filed on December 11, 1965, and was granted on March 1, 1965 (R. 118–119). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a sheet metal plant engaged primarily in fabricating, installing, and repairing equipment to be used by manufacturers and processors in the production of goods for interstate commerce is a "retail or service establishment" within the exemption provided by Section 13(a) (2) and (4) of the Act.

STATUTES INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended by the Fair Labor Standards Act Amendments of 1949, 63 Stat. 910, and by the Act of May 5, 1961, 75 Stat. 65 (29 U.S.C. 201, *et seq.*), are printed in the Brief for Petitioner, Appendix A, page 17.

STATEMENT

This case involves two consolidated actions brought by the Secretary of Labor under the Fair Labor Standards Act—one seeking an injunction under Section 17 of the Act to restrain further violations by petitioner of the Act's overtime requirements, and the other instituted under Section 16(c) to recover unpaid overtime compensation on behalf of one of petitioner's employees (R. 11). Petitioner admittedly did not pay its employees in accordance with the overtime requirements of the Act (R. 24–25). It contended that the employees were not within the coverage of the Act and that, in any event, the business was a "retail or service establishment" entitled to exemption under Section 13(a) (2) and (4) of the Act (R. 26).

1. Petitioner operates a plant in Burley, Idaho, where it employs some twelve workers in fabricating, installing, and repairing sheet metal products (R. 11–21, 24–25, 44, 100–101). Although petitioner does some fabrication work for small businesses and individuals, and, as an "incidental," sells small stock items (R. 49), about 83% of its gross income during the years involved in these actions (1959 through 1961)—$563,035 out of a total of $673,808—was derived from the fabrication, installation, and maintenance of equipment for five large potato processors in the Burley area (R. 12–19; 100–101). Petitioner's employees, during many workweeks, spent a substantial part of their time working on equipment—such as vats, storage tanks, elevator buckets, and chutes—which is made to order in accordance with the plans and specifications of the particular processor and used in the production of dehydrated and frozen potatoes for interstate shipment (R. 12–21, 50–51, 54, 101).[1] Some of this work, both fabrication and installation, was performed in the customer's plants, and on such occasions, petitioner's employees would work along-

[1] The manager of the Shelley Processing Company testified as to several of these items and the use made of them by his company. These included: a number of receiving tanks, each holding some 5,000 pounds of peeled potatoes, which are located at the ends of the trimming tables in the Shelley plant and help control the feed of the potatoes to the individual processing lines (R. 32–34, 43); elevator buckets and chutes made by defendant for the purpose of transferring potatoes from one processing line to another (R. 35–36); and some 50 hoods, which are located over the various cookers in the plant and are used to vent steam and vapors through the roof of the plant (R. 34–35).

side customers' employees, under the same supervision (R. 39–40, 101).

In addition to the 83% of its income derived from the work for the five potato processors, petitioner derived another 3% of its income from comparable work performed for five other interstate producers engaged in the manufacture or processing of sugar, flour and millfeed, seeds, and containers (R. 17–21, 100–101).

2. Petitioner's claim to exemption as a "retail or service establishment" under Section 13(a) (2) and (4) of the Act rested upon the testimony of its lawyer-accountant, its general manager, its president, and two salesmen who sell metal products to it (R. 51–52, 58–67), to the effect that they considered establishments such as petitioner's to be "custom retail and service establishments" (R. 61). The lawyer-accountant explained that his view was based on the belief that such establishments evolved from the "early tin shop" found in hardware stores around 1900 (R. 58–61), although he acknowledged that there are "marked differences" between petitioner's operation and that of the traditional tin shop. The former, he stated, is "immensely larger"; its product is "larger in size and much higher in price"; and the early tin shop did not fabricate equipment for potato processing plants since there "were no potato plants in existence in those days" (R. 62). Petitioner's president testified that he regarded his business as "retail" because "[e]very job we do is to the customer's specific recommendations and to his personal use" (R. 52), and because 60% of his sales (in

number, not in dollar volume) is to "the general public" as distinguished from industrial customers (R. 57). He acknowledged, however, that the market for the type of equipment fabricated by petitioner for potato processors (which accounted for 83% of its total income) was "definitely" limited (R. 54). Three other witnesses gave no explanation whatsoever of the basis for their views (R. 63–64, 65, 66–67).

3. The district court upheld petitioner's contention that the work performed for the interstate producers did not bring its employees within the Act's coverage, citing *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310 (R. 89–90). It also sustained petitioner's claim to exemption as a "retail or service establishment" on the basis of its findings that petitioner's business was so recognized in the industry "as shown by the testimony of the manager of defendant corporation and representatives of companies selling materials to defendant" (R. 91). It declined to follow this Court's decision in *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, on the ground that its description of the "retail concept" was "repudiated by the 1949 amendment to the Act" (R. 91).

The court of appeals reversed on both issues (R. 99–108). On the coverage issue, it relied on the *Roland* decision and on legislative history showing "beyond doubt that the holding in Roland that those employees were * * * within the coverage of the Act, would not be affected by the 1949 amendment" (R. 105).

On the exemption question, the court, citing *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, treated as irrelevant the testimony of petitioner's witnesses

to the effect that the business was considered "retail" in the industry, and ruled instead that the case was governed by the holding in *Roland* that the exemption is not applicable to the business of selling industrial goods and services to manufacturers producing goods for commerce. On the basis of the legislative history, the court below pointed out that the 1949 amendment was not intended to repudiate the *Roland* holding, or to extend the traditional "retail concept" to types of businesses not previously covered by it, but merely to do away with the "business use" test whereby any sale of goods or services for use in the customer's business was *ipso facto* deemed non-retail. The court concluded that petitioner's business, like the similar enterprise in *Roland* and like the small loan business in *Kentucky Finance, supra,* was "outside the retail concept" of the Act independently of the rejected "business use" test, and, therefore, could not be classified as retail under the 1949 amendment.

The petition for a writ of certiorari sought review of both the coverage and the exemption rulings but the writ granted by this Court was limited to the exemption question (R. 118).

ARGUMENT

PETITIONER'S BUSINESS IS NOT AN EXEMPT "RETAIL OR SERVICE ESTABLISHMENT" BECAUSE MORE THAN 25 PERCENT OF ITS BUSINESS INVOLVES THE SALE AND SERVICING OF MANUFACTURING EQUIPMENT FOR USE IN THE PRODUCTION OF GOODS FOR INTERSTATE COMMERCE

Introduction and Summary

1. The parties are agreed on the starting point for decision of this case. Petitioner, unlike the respond-

ent Steepleton in the companion case, No. 31, acknowledges that more is required for the retail exemption than a mere showing that 75 percent of a company's sales are not-for-resale and are labelled "retail" for one or another purpose by people in or connected with the industry. As petitioner states at pp. 6–7 of its brief, "This Court in *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, interpreted the 1949 amendments to the Fair Labor Standards Act in such a way as to impose an additional requirement, namely, that the industry under consideration be considered retail under traditional concepts."

In *Kentucky Finance,* this Court held that a small loan business, although characterized as "retail" by the industry itself, was ineligible for the exemption because "nothing in the debates or reports * * * suggests that Congress intended by the amendment to broaden the fields of business enterprise to which the exemption would apply" and, under traditional concepts, financing was not a business to which the exemption applied whether or not particular types of finance companies "were thought of in the financial industry as engaged in 'retail financing' * * *." 359 U.S. at 294, 295. As we have pointed out in greater length in the *Steepleton* case, the Court based its conclusion on two facts. First, the sole purpose of the 1949 amendments was to eliminate the "business use" test under which "sales to other than individual consumers could not qualify as retail." 359 U.S. at 294. Second, the limited scope of the amendment—including a listing of businesses to which the exemption would not apply because of traditional concepts—was repeatedly

emphasized in "the explicit and repeated statements of the sponsors of the amendatory legislation and in the House and Senate Reports * * *." *Id.* at 295. The Court concluded in *Kentucky Finance* that "[i]n the light of the abundant pointed evidence that Congress did not intend that businesses like those of respondents be exempted from the overtime and record-keeping provisions of the statute by § 13(a)(2), we would not be justified in straining to bring respondents' activities within the literal words of the exemption." *Id.* at 296.

2. The parties to this case differ only as to the application of the *Kentucky Finance* standards to this case. Although ignoring the legislative history of the 1949 amendments, petitioner acknowledges the relevance of traditional concepts of "retail" applied under the Act prior to 1949. It simply contends that the construction and repair of equipment made of sheet metal to be used in the production of goods for commerce falls within traditional concepts of retail. We submit that, to a truly startling extent, the considerations controlling the decision in this case are identical to those determinative in *Kentucky Finance*. The legislative history which dictated this Court's conclusion that credit companies are not within the scope of this exemption as amended, regardless of the industry's view of "retail" selling or servicing (359 U.S. at 295), is equally conclusive of the non-exempt and ineligible status of an establishment (like petitioner's) engaged predominantly "in the sale and servicing of manufacturing equipment used in the production of goods" (House Conference Report, 95 Cong. Rec.

14932; Statement of Majority of Senate Conferees, 95 Cong. Rec. 14877). The non-exempt status of establishments engaged in the latter type of business is no less evidenced by "explicit and repeated statements of the sponsors of the amendatory legislation and in the House and Senate Reports * * *." (359 U.S. at 295). Moreover, as in *Kentucky Finance*, this explicit legislative history reflects a Congressional desire to maintain the traditional concepts of "retail" prior to 1949 and, under such concepts, petitioner's business, like that of a finance company, was plainly not "retail." Besides adopting what Congress regarded as objectionable "dicta"[2] setting forth the doctrine that no sale for business use was retail, this Court in *Roland Electric* also applied just such a traditional concept in holding that the exemption did not apply to establishments "which supply the materials and services currently needed for the maintenance of productive machinery used by those who produce goods for interstate commerce * * *." 326 U.S. at 668.

I. THE LEGISLATIVE HISTORY OF THE 1949 AMENDMENTS DEMONSTRATES CONCLUSIVELY THAT THE SALE AND SERVICING OF MANUFACTURING EQUIPMENT USED TO PRODUCE GOODS FOR INTERSTATE COMMERCE IS WHOLLY OUTSIDE THE "RETAIL CONCEPT" OF THE FAIR LABOR STANDARDS ACT

Over eighty percent of petitioner's business involves the fabrication, installation, and maintenance of manufacturing equipment for companies producing and processing goods for shipment in interstate com-

[2] 95 Cong. Rec. 12497 (Senator Holland, sponsor of the amendment in the Senate).

merce (R. 12–19, 17–21, 100–101). Congress explicitly considered the applicability of the Fair Labor Standards Act to such enterprises at the time of the 1949 amendments to the Act. Its conclusions were stated in the legislative history with rare clarity. Both the House Conference Report and the Statement of the Majority of Senate Conferees declared unequivocally that "the amendment * * * does not exempt an establishment engaged in the sale and servicing of manufacturing machinery and manufacturing equipment used in the production of goods [for interstate commerce] * * *" (95 Cong. Rec. 14932), "[n]or * * * change the status of * * * establishments selling industrial goods and services to manufacturers engaged in the production of goods for interstate commerce and to other industrial and business customers (such as the establishment held nonexempt in *Roland Electric Co.* v. *Walling,* 326 U.S. 657)" (*id.* at 14877).

The sponsors of the amendment in both the House and the Senate specifically reaffirmed what they regarded as a traditional concept properly applied in *Roland Electric* at the same time as they repudiated the "dicta" in that decision. That concept is that the Act does not exempt, as "retail" workers, "the multitude of employees who are engaged in establishments * * * which supply the materials and services currently needed for the maintenance of productive machinery used by those who produce goods for interstate commerce," since the materials and goods supplied to such customers "remained actively in use in the production of the 'flow of goods in commerce' " (*Roland,* 326 U.S. at 668, 678). To extend the exemption to such

enterprise "would take the heart out of this Act. Savings resulting from substandard labor conditions would be reflected directly into competitive costs." 326 U.S. at 668.

As the legislative history makes unmistakably clear, the Congressional objection to the *Roland* decision had nothing to do with this traditional concept, but was confined to "the dicta" in the opinion to the effect that it was appropriate to restrict the meaning of "retail" to sales made "to meet personal rather than commercial and industrial uses" (326 U.S. at 675). The 1949 amendment was aimed only at this "dicta and references in that decision" which deemed non-retail all "business sales, * * * no matter how they may happen, in spite of the fact that they are completely intrastate" (*e.g.*, 95 Cong. Rec. 12497, 12498, 12499), and which seemed to announce "the sweeping ruling * * * that no sale of goods or services for business use is retail" (H. Conf. Rep., 95 Cong. Rec. 14931). As this Court concluded in *Kentucky Finance:* "The legislative history of the 1949 amendment * * * demonstrates beyond doubt that Congress was acting in implementation of a specific and particularized purpose"—*i.e.*, to obviate this "sweeping" "business use" test (359 U.S. at 293, 294, n. 5).

Indeed, far from repudiating the holding of *Roland,* as opposed to its dicta, the sponsors of the 1949 amendment specifically endorsed the result of the case, bottomed as it was on a traditional concept at the very heart of the Act—the intent to reach, and not to exclude, employees engaged in "establishments * * * which supply the materials and services currently needed for the maintenance of productive machinery"

used "in the production of the 'flow of goods in commerce'" (326 U.S. at 666, 678, quoted more fully, *supra*, p. 10). Not only did the reports of both House and Senate conferees expressly state that the amendment "does not exempt" nor "change the status of" establishments engaged in the sale and servicing of such manufacturing equipment (*supra*, p. 10), but "[a]ny residual doubt on this score is dispelled by the explicit and repeated statements of the sponsors of the amendatory legislation" (cf. *Kentucky Finance*, 359 U.S. at 295). Thus Senator Holland (sponsor of the amendment in the Senate), assured his colleagues, explicitly and specifically, that the *Roland* case would "[d]efinitely not" be decided any differently under the amendment (95 Cong. Rec. 12505; see also *id.* at 12497). This statement was made directly with reference to *Roland's* holding "that a company engaged in selling industrial goods and service to manufacturers engaged in the production of goods for interstate commerce and to other industrial and business customers was not a retail or service establishment" (*id.* at 12505).[3]

If further evidence were needed of the legislative intent to preserve the basic statutory "retail concept" as described in *Roland*, abundant confirmation is to be found in the reports and debates with respect to the closely related 1949 amendment of Section 3(j),

[3] See also statement by the Chairman of the House Conferees' Committee in submitting the conference report (95 Cong. Rec. 14942): "[T]he reference to *Roland Electrical Co.* v. *Walling* * * * should not mislead anyone into concluding that the conferees intended to reverse or nullify that decision."

defining the scope of the Act's "production" coverage. Here, too, explicit statements in both the House and Senate reports demonstrated beyond doubt the legislative intent to retain the Act's coverage of employees engaged in selling and servicing industrial machinery, tools, and equipment used in the production of goods for commerce. Thus both the House and Senate reports stated that the amended language of the definition of "produced,"[4] would continue to cover employees, who, like those in the instant case, "make, repair, or maintain machinery or tools" or "machinery parts * * * or other equipment used by purchaser in producing goods for interstate commerce"—"whether they are employed by the producer of goods or someone else who has undertaken the performance of particular tasks for the producer" (H. Rep., 95 Cong. Rec. 14928–29; S. Rep., *id.*, 14874–75).[5] The Senate report was even more explicit, approving, by name, the *Roland* decision and a number of other previous court decisions involving activities indistinguishable from the business of petitioner

[4] Before the amendment, the pertinent portion of Section 3(j) read: "for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in * * * *any process or occupation necessary to the production thereof*, in any State." [Emphasis added.] The 1949 amendment changed the italicized words to read: "or in any closely related process or occupation directly essential to the production thereof * * *."

[5] The more detailed context of the above quoted statements, printed in the Appendix, *infra*, pp. 18–19, plainly manifests the legislative intent to preserve the Act's application to precisely the kind of "production for commerce" activities in which petitioner here is engaged.

in the instant case.[6] This careful and specific delineation in the Congressional Reports of the effect of the 1949 amendment of a key coverage provision of the Act would have been meaningless if Congress intended to exempt such employees by its simultaneous amendment to the "retail or service establishment" exemption.[7]

---

[6] Among the decisions thus approved, in addition to *Roland*, were *Walling* v. *Amidon*, 153 F. 2d 159 (C.A. 10), upholding the Act's coverage of employees of a sand and gravel company engaged in selling sand for use as lining material to protect from heat equipment used in producing steel products; *Holland* v. *Amoskeag Machine Company*, 44 F. Supp. 884 (D. N.H.), upholding the Act's coverage of sheet metal workers and electricians engaged in repairing machinery for their employers' customers, some of whom are manufacturers of goods for commerce; and *Walling* v. *Hamner*, 64 F. Supp. 690 (W.D. Va.), upholding coverage of employees of a saw mill producing mine props sold to local coal mines for use as roof supports during mining operations.

[7] The inapplicability of the traditional retail concept to petitioner's business is further demonstrated by the "pre-1949 rulings and interpretations by the Administrator" which, as this Court pointed out in *Kentucky Finance* (359 U.S. at 292, n. 1), Congress directed "should remain in effect unless inconsistent with the statute as amended." 63 Stat. 920. The Administrator's Interpretative Bulletin, listing businesses which "are not in the ordinary case sufficiently similar in character to retail establishments" to qualify for exemption, included, along with "personal loan companies," such enterprises as "machine shops and foundries", "industrial blacksmiths", and "establishments engaged in sharpening and reconditioning industrial tools." 1942 Wage & Hour Manual, pp. 326, 334–335. The fact that sheet metal companies were not mentioned by name is, of course, irrelevant where such enterprises share with the businesses specifically listed the controlling characteristic that all are engaged primarily in furnishing and maintaining manufacturing equipment. See *Roland Electric Co.* v. *Walling*, 326 U.S. at 677, and *Goldberg* v. *Sorvas*, 294 F. 2d 841, 846 (C.A. 3).

II. THE DECISIONS RELIED UPON BY PETITIONER DO NOT SUPPORT ITS CLAIM OF EXEMPTION IN THIS CASE

Petitioner places its primary reliance on *Wirtz* v. *Modern Trashmoval, Inc.*, 323 F. 2d 451 (C.A. 4), certiorari denied, 377 U.S. 925, in which the Fourth Circuit held that trash-removal services were not outside "the traditional retail concept." The starting point of the court's analysis was this Court's decision in *Kentucky Finance*, which, the Fourth Circuit recognized, held that "there are fields which completely lack a retail concept, such as the financial field, and there are business activities which have been specifically mentioned by Congress as being ineligible for exemption as retail or service establishments." 323 F. 2d at 465. The court's decision depended upon its conclusion "that trash removal is not in either of these categories." *Ibid.* In contrast, here as in *Kentucky Finance*, Congress has specifically declared in both Committee Reports and debate that the particular business activities—"the sale and servicing of * * * manufacturing equipment used in the production of goods" (95 Cong. Rec. 14932, 14877)—are ineligible for exemption as retail or service establishments because they fall outside the traditional retail concept as expressed by the holding of *Roland Electric*.

The other decision on which petitioner relies, *Wirtz* v. *English Oil Service* (D. Kan., April 29, 1965), 16 WH Cases 867, 51 Labor Cases ¶ 31,689,[8] far from supporting petitioner's position, ruled quite the opposite. It held that an enterprise whose primary business was

[8] The decision of the district court is not yet officially reported. There has been no appeal of the district court decision.

the hauling away and disposing of salt water and basic sediment from producing oil wells—thereby furnishing services closely related and directly essential to the production of oil for interstate commerce—could *not* qualify for the exemption, even though, as the court expressly noted, such "services are considered 'retail' within the oil industry" (16 WH Cases at 871). The court reached this conclusion on the ground that "the bulk of defendants' services were sold to * * * oil producers" which "are concentrated in the producing end of the economic chain" and "occur in the production aspects of the industry" (*id.* at 870). The "key" to its decision, said the court, was that a "retail or service establishment" within the contemplation of the exemption "performs a function in the business organization of the nation which is at the very end of the stream of distribution" (*ibid.*).

In *English Oil,* the district court recognized that *Modern Trashmoval* had properly required an "initial inquiry" into whether "defendant's activities are considered retail under traditional concepts,"[9] and distinguished the *Modern Trashmoval* decision specifically on the ground that the Fourth Circuit had "answered that initial inquiry in the affirmative" (id. 869–870). Noting that "[t]he basic philosophy of 13(a)(2) remained the same" under the 1949

[9] The Fourth Circuit said in *Modern Trashmoval* that, as to businesses which neither "completely lack a retail concept" nor "have been specifically mentioned by Congress as being ineligible for exemption" (323 F. 2d at 465), "we think the most satisfactory approach is to examine the facts of record * * * in the light of general criteria developed under the Act since its enactment in 1938" (*ibid.*).

amendment (citing the *Kentucky Finance* decision), the court concluded: "*Only if* such [initial] inquiry is answered in the affirmative do we reach the question of whether defendants' sales or services to business or commercial customers are considered as retail in the particular industry. If the initial inquiry is answered in the negative, the exemption is simply not established" (*id.* at 869, emphasis in original). In the case at bar, as in *English Oil*, plainly the initial inquiry must be answered in the negative, as a matter of law.

CONCLUSION

Since over 80 percent of petitioner's gross annual income is derived from sales and services which are wholly outside the statutory "retail concept," petitioner cannot qualify for the "retail" exemption. Accordingly, the judgment below should be affirmed.

Respectfully submitted.

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APPENDIX

Senate Report (95 Cong. Rec. 14874–75, emphasis added):

> Typical of the classes of employees whose work is closely related and directly essential to production, within the meaning of section 3(j) as amended by the conference agreement, are the following employees performing tasks necessary to effective productive operations of the producer.
>
> 1. Office or white-collar workers [citing, *inter alia*, the *Roland Electrical* decision].
>
> 2. Employees *repairing, maintaining, improving or enlarging the buildings, equipment, or facilities of producers of goods* [citing *Roland* first, followed by *Kirschbaum* v. *Walling*, 316 U.S. 517, and other pre-1949 decisions].
>
> * * * * *
>
> The work of such employees is, as a rule, closely related and directly essential to production *whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer.*
>
> The work of employees or employers who *produce or supply goods or facilities for customers engaged within the same State in the production of other goods for interstate commerce* may also be covered as closely related and directly essential to such production. This would be true, for example, of employees engaged in the following activities.
>
> 1. *Production of tools,* dies, designs, patterns, *machinery, machinery parts,* mine props, industrial sand, *or other equipment used by purchaser in producing goods for interstate commerce* [citing *Roland* along with the *Amoskeag*

Machine Co., Amidon, and *Hamner* decisions, see *supra,* p. 14, fn. 6].

* * * * *

House Report (95 Cong. Rec. 14928–29, emphasis added):

* * * the proposed changes are not intended to remove from the act *maintenance,* custodial, and clerical *employees of manufacturers,* mining companies, and *other producers of goods for commerce.* Employees engaged in such *maintenance, custodial, and clerical work will remain subject to the act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce.* * * *

The bill as agreed to in conference also does not affect the coverage under the act of employees who *repair or maintain buildings in which goods are produced for commerce* (*Kirschbaum* v. *Walling,* 316 U.S. 597), or *who make, repair or maintain machinery or tools and dies used in the production of goods for commerce.* Likewise, employees of public utilities, furnishing gas, electricity or water to firms within the State engaged in manufacturing, producing, or mining goods for commerce, will remain subject to the act. *All the employees mentioned in this paragraph are doing work that is closely related and directly essential to the production of goods for commerce.*

* * * * *

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

Nos. 30 and 31.

IDAHO SHEET METAL WORKS, INC., Petitioner, 30 vs. W. WILLARD WIRTZ, Secretary of Labor.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
W. WILLARD WIRTZ, Secretary of Labor, Petitioner, 31 vs. STEEPLETON GENERAL TIRE COMPANY, INC., et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

PETITION TO REHEAR.

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SUPREME COURT OF THE UNITED STATES.

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W. WILLARD WIRTZ, Secretary of Labor, Petitioner, 31 vs. STEEPLETON GENERAL TIRE COMPANY, INC., et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

PETITION TO REHEAR.

On behalf of respondent, Steepleton General Tire Company, Inc., we petition the Court to grant a rehearing of this cause. With respect we assert that the Court, in reversing the opinions of the district judge and the Court of Appeals of the Sixth Circuit, has overlooked two cardinal legal propositions.

First, the Court has gone beyond the face of statutory language and deduced a meaning from legislative history.

We believe the Court should not concern itself with exploring the labyrinth of legislative history unless it cannot gain the meaning of a statute from merely reading the language. Here the only language to be interpreted is whether or not sales of the type under consideration are "recognized as retail sales or services in the particular industry." It is difficult to imagine words of the English language of clearer meaning and in simpler arrangement. Yet, the Court, without finding the slightest ambiguity or inconsistency and, without saying how or why, disposes of the statutory language in less than a full sentence: "After rejecting the industry's usage as controlling, we face the further difficult question of what criteria do determine when business transactions are retail under the act." Unless there is some deficiency in the language, the Court is not free to distill its own conclusions from the opposing views of the partisans in the legislative debates. This is the first great error of the opinion and results from the failure of the Court to notice cases which clearly state this rule and which have not been called to the attention of the Court heretofore.

An apt and succinct statement of the rule is in **Ex Parte Collett**, 337 U. S. 55, 93 L. Ed. 1207, at p. 61:

> "**Third.** Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of § 1404 (a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' Gemsco, Inc. v. Walling, 324 U. S. 244, 260, 89 L. ed. 921, 933, 65 S. Ct. 605 (1945). This canon of construction has received consistent adherence in our decisions."

See also **U. S. v. Public Utilities Commission,** 345 U. S. 295, 97 L. Ed. 1020; **U. S. v. Oregon,** 366 U. S. 643, 6 L. Ed. 2d 575.

The Court well stated both the rule and the reason for it in the earlier case of **Railroad Commission v. Railroad,** 257 U. S. 561, 66 L. Ed. 371, when Mr. Chief Justice Taft, speaking for a unanimous Court, said:

> "Great stress is put on the legislative history of the Transportation Act to show that the bill was not intended to confer on the Commission power to remove any discrimination against interstate commerce involved in a general disparity between interstate and intrastate rates. Committee reports and explanatory statements of members in charge, made in presenting a bill for passage, have been held to be a legitimate aid to the interpretation of a statute where its language is doubtful or obscure. Duplex Printing Press Co. v. Deering, 254 U. S. 443, 475, 65 L. ed. 354, 16 A. L. R. 196, 41 Sup. Ct. Rep. 172. But when, taking the act as a whole, the effect of the language used is clear to the court, extraneous aid like this cannot control the interpretation. Pennsylvania R. Co. v. International Coal Min. Co., 230 U. S. 184, 198, 57 L. ed. 1446, 1451, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315; Caminetti v. United States, 242 U. S. 470, 490, 61 L. ed. 442, 455, L. R. A. 1917F, 502, 37 Sup. Ct. Rep. 192, Ann. Cas. 1917B, 1168. Such aids are only admissible to solve doubt, and not to create it."

It has **never** been suggested that the phrase "recognized as retail sales or services in the particular industry" is ambiguous or unclear. It is the classification that was used in the NRA Code by the Regulations of the Office of Price Administration, by the tire industry, by state taxing authorities, and clearer words in simpler arrangement would be difficult to find.

The Court erred when, without prior insistence and prior finding of ambiguity, it vaulted over the clear language of the statute into the murky world of partisan discord from whence emerged the statute.

The second error is less fundamental but it seems greatly to have colored the judgment of the Court. It is apparently the feeling of the Court that it has before it de novo the question of how the sales were "recognized" in the particular industry. The Court weighs the evidence —"The only explanation offered for this use was that it conformed to many sales tax statutes. The Secretary showed that the industry sometimes used the word retail in other senses that excluded commercial sales and that commercial customers of Steepleton did not regard their purchases as retail transactions." The finding of the Court that "The only explanation . . . was that it conformed to many sales tax statutes" is clearly erroneous, for the record reflects that no other definition is sanctioned by history, definition, custom, or reason. 117 (a), 288 (a), 397 (a), 400 (a), 401 (a), 403 (a), 414 (a), 429 (a), 434 (a), 435 (a), 459 (a), 467 (a), 468 (a), 483 (a), 487 (a), 497 (a), 498 (a), 568 (a), 569 (a), 570 (a), 576 (a), 611 (a), 625 (a), 641 (a), 656(a)-657 (a), 688 (a), 689 (a), 845 (a), 885 (a), 863 (a).

However, the conclusion of both inferior courts that the sales in question were of a type "recognized as retail sales or services in the particular industry" is not an open question in this Court. Just as the Court should be stayed from attempting to construct a meaning of the statute from its history rather than from its clear language, so a reweighing of the evidence as to the nature of the sales is denied the Court by the language of **Rule 52 (a)**, Federal Rules of Civil Procedure. **U. S. v. Gypsum Co.**, 333 U. S. 364; **Commissioner v. Duberstein**, 363 U. S. 278; **Grover Tank & Mfg. Co. v. Linde Air Products Co.**, 339 U. S. 605.

The rules of the Court do not permit us to argue whether the opinion is or is not supported by the legislative history or whether or not it is logical, sound, or squares with common sense. Even in the absence of Rule 58, we could make no such argument, for our license to audience before the Court was not obtained by any showing of superior learning in natural reason, logic, or common sense. Our right to the ear of the Court rests alone upon asserted knowledge of "the artificial reasoning of the law." One of history's most momentous conversations was the famous Sunday colloquy between Lord Coke and the King, which has shaped our system of justice. It occurred when the Arch-Bishop of Canterbury expounded the royal prerogative. He argued that since judges were but delegates of the King, the King might at any time do personally what he ordinarily did by delegates and himself try cases.

Coke answered in behalf of the judges that by the law of England the King in person could not adjudge any cause. All causes, civil and criminal, were to be determined in some court of justice and according to the law and custom of the realm. "But," said the King, "I thought law was founded upon reason, and I and others have reason as well as judges." "True it is," said Coke, "that God hath endowed His Majesty with excellent science and great endowments of nature; but His Majesty is not learned in the laws of his realm of England, and causes which concern the life or inheritance or goods or fortunes of his subjects are not to be decided by natural reason, but by the artificial reason and judgment of the law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it."

However, full of "natural reason" as is the Court's opinion, based upon the conclusions which it has drawn

from the legislative history of the statute, we respectfully assert that the Court disregarded the "artificial reasoning of the law" which does not sanction the seeking of meaning of statutes from sources other than the language of such statute until ambiguity or conflict of language have made construction impossible and, also, in weighing facts which are closed to assay because of rule 52 (a).

We respectfully petition the Court to amend its opinion and affirm in case No. 31 **(Wirtz v. Steepleton General Tire Company, Inc.)**, or, in the alternative, set the case for re-hearing so that we may have an opportunity to amplify these points and, at the same time, receive our first opportunity to demonstrate to the Court that there is virtually no similarity between cases Nos. 30 and 31.

Respectfully submitted,

.....

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The foregoing petition for rehearing is presented in good faith and not for delay. Five copies of the petition have been served upon the Honorable Thurgood Marshall, Solicitor General, Department of Justice, Washington,

D. C. 20530, and upon Honorable Charles Donahue, Solicitor, Department of Labor, Washington, D. C. 20210, by placing said copies, duly addressed and with postage prepaid, in the United States mail, this the ... day of March, 1966.

.....

Lucius E. Burch, Jr.

SUPREME COURT OF THE UNITED STATES

Nos. 30 AND 31.—OCTOBER TERM, 1965.

Idaho Sheet Metal Works, Inc., Petitioner, v. W. Willard Wirtz, Secretary of Labor.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
W. Willard Wirtz, Secretary of Labor, Petitioner, v. Steepleton General Tire Company, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

30

31

[February 24, 1966.]

MR. JUSTICE HARLAN delivered the opinion of the Court.

The common question presented by these two cases is the meaning of the phrase "retail or service establishment" as that language is used in the exemptive provisions of the federal wage and hour statute. We first set forth the statute and describe the two cases before us, then examine the history and content of the exempting clause, and finally apply the resulting analysis to the facts of each case.

I.

The Fair Labor Standards Act of 1938 enacted a comprehensive scheme providing for minimum wages and overtime pay for workers "engaged in" or "in the production of goods for" interstate and foreign commerce.[1]

[1] 52 Stat. 1060, as amended, 29 U. S. C. §§ 201–219 (1964 ed.). Sections 6–7, codified as §§ 206–207, respectively cover minimum wages and overtime pay. The commerce coverage of the Act, through a special definition of "production," is drawn in generous terms. See § 3 (j), codified as § 203 (j).

Among other exemptions, Congress by § 13 (a)(2) of the Act has excluded from the statute's wage and hour protections those employees working for certain "retail or service establishments." [2] To qualify for this exemption in its present form, an establishment must meet three tests: *first*, it must make more than 50% of its annual dollar volume of sales of goods or services within the State; [3] *second*, the establishment must meet one of four tests designated "(i)–(iv)," chiefly designed to prevent most very large employers from enjoying the exemption; [4] *third*, it must be a "retail or service establishment." Regarding this third requirement—which is the focus of this decision—§ 13 (a)(2) states that "[a]

---

[2] 52 Stat. 1067, as amended, 29 U. S. C. § 213 (a)(2) (1964 ed.). The section provides that the minimum wage and overtime pay provisions of the Act shall not apply to:

"(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, if such establishment—

". . . [meets one of four tests, designated '(i)–(iv)' and framed with reference to another section of the Act].

"A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry."

[3] This requirement has been met by the companies in this case. Section 13 (a)(4) of the Act, added in 1949 by 63 Stat. 917, 29 U. S. C. § 213 (a)(4) (1964 ed.), provides that an establishment that makes or processes the goods it sells may qualify as exempt if it meets the tests of § 13 (a)(2) and "is recognized as a retail establishment in the particular industry" and makes more than 85% of its annual dollar volume of sales of such goods within the State. So far as the companies in this case may be deemed to make or process the goods they sell, the Government is apparently satisfied that the added requirements of § 13 (a)(4) have been met or at least is unwilling to rely upon them.

[4] These four tests were added to § 13 (a)(2) in 1961 by 75 Stat. 71. The Government has not suggested that this amendment would disqualify either of the companies in the present case.

'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry."

Of the cases before us, the first one, No. 30, stems from two consolidated actions brought by the Secretary of Labor against Idaho Sheet Metal Works, Inc. (Idaho Sheet). By one action the Secretary sought to enjoin future disregard of the Act's overtime provisions, and by the other he sought to collect on behalf of one employee unpaid overtime compensation for a period during the year 1960. See §§ 15–17, 52 Stat. 1068, as amended, 29 U. S. C. §§ 215–217 (1964 ed.). The ensuing litigation established that Idaho Sheet operates a plant in Burley, Idaho, where it employs about 12 workers to fabricate, install, and maintain sheet metal products. Many articles are sold to individuals, farmers, and local merchants, the plant has display racks to show its wares, and about 60% of sales in number are said to be to "the general public" as opposed to industrial customers. About 83% of the gross income, however, is derived from metal work done on equipment used by five potato processing companies which dehydrate and freeze the potatoes for interstate shipment.

For its defense, Idaho Sheet denied its workers were engaged in or producing goods for interstate commerce. It also claimed to be an exempt retail or service establishment, adducing proof that over 75% of its dollar volume of sales were not for resale and that its officials and salesmen who sell to it regarded the business as retail. The District Court held that Idaho Sheet was outside the interstate commerce coverage of the Act and was in any case exempt. The Court of Appeals for the Ninth Circuit reversed on both points and held in favor of the Secretary. 335 F. 2d 952. We granted certiorari lim-

ited to the question whether Idaho Sheet was a retail or service establishment within the meaning of the Act. 380 U. S. 905.

In the other case before us, No. 31, the Secretary of Labor sued the Steepleton General Tire Company (Steepleton) and its president to require compliance with the minimum wage, overtime pay, and record-keeping provisions of the Act. Steepleton, which is located in Memphis, Tennessee, and employs about 47 workers, is a franchised tire dealer engaged in the sale, recapping, and repair of tires. Some of Steepleton's income derives from dealings with private customers but more than half the gross income comes from sales and repairs of tires furnished to businesses operating heavy industrial or construction vehicles or operating fleets of trucks; apparently a sizable though unspecified portion of these commercial customers operated their equipment in interstate commerce.

The District Court determined that Steepleton came within the interstate commerce coverage of the Act, and that issue is no longer in the case. Alleging itself to be exempt under § 13 (a)(2), Steepleton showed that 75% or more of its sales were not for resale and that the industry's predominant and longstanding use of the word retail applied that term to all tire sales not for resale, despite the commercial character of the tires and the established pattern of quantity discounts. The only explanation offered for this use was that it conformed to many state sales tax statutes. The Secretary showed that the industry sometimes used the word retail in other senses that excluded commercial sales and that commercial customers of Steepleton did not regard their purchases as retail transactions. The District Court held Steepleton to be entitled to the exemption. The Court of Appeals for the Sixth Circuit affirmed the District Court in all respects, 330 F. 2d 804, and we

granted certiorari at the behest of the Secretary to consider whether Steepleton qualified as a retail or service establishment. 380 U. S. 904.

The approach of the Sixth Circuit, which took industry usage as controlling, and that of the Ninth Circuit, which rejected it as the sole test, represent irreconcilable interpretations of the critical statutory language. While support can be mustered for both views, we believe the Ninth Circuit is correct and on this point follow our earlier decision in *Mitchell* v. *Kentucky Finance Co.*, 359 U. S. 290. After rejecting the industry's usage as controlling, we face the further difficult question of what criteria do determine when business transactions are retail under the Act; to this question it is still less easy to return a clear-cut answer, but our analysis of the matter leads us to conclude that neither Idaho Sheet nor Steepleton qualifies as a retail or service establishment.

II.

To construe the present language of the exemption demands a knowledge of its origins. Section 13 (a)(2), as it appeared in the 1938 enactment, used the present phrase "retail or service establishment" to delimit the exemption but did not further define the concept.[5] The Department of Labor's Wage and Hour Administrator initially made his interpretation of the retail exemption known through an Interpretative Bulletin and through various official statements.[6] To summarize very gener-

[5] The 1938 version read: "(a) The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." 52 Stat. 1067.

[6] This Bulletin, designated No. 6, appears along with other official statements in various editions of the BNA Wage and Hour Manual (hereafter cited as WH Manual), *e. g.*, 1942 edition. The Secretary's present views are stated in 29 CFR §§ 779–779.515 (1965 ed.).

ally, the Administrator viewed a retail establishment as one selling goods or services to private individuals for personal or family consumption; sales of these same goods or services to businesses or state agencies remained retail if sold at the normal price charged private consumers or in quantities a private consumer would buy. See Interp. Bull. No. 6, ¶ 14, in 1942 WH Manual, p. 330. However, there were deviations from this consumer-goods standard in favor of employers, notable instances being the exemption of farm implement dealers and linen supply firms supplying commercial customers. See Statements of the Administrator, in 1944–1945 WH Manual, pp. 469–470.

In 1946 this Court decided *Roland Co.* v. *Walling*, 326 U. S. 657, holding *inter alia* that a business engaged in commercial wiring, electrical contracting for industry, and repair and replacement of electric motors and generators did not constitute a retail or service establishment. The opinion used considerable language suggesting that no sale of any article for business or profit-making use as opposed to personal consumption could qualify as a retail sale, a position which supported the result but went far beyond a necessary holding. See 326 U. S., at 673–677. This case, and several others in this vein,[7] prompted the Administrator to report to Congress that certain hitherto exempt classes of business were endangered—notably farm equipment dealers—and to recommend amending legislation. See 1948 Wage and Hour Division, Annual Report, pp. 120–121.

The Administrator proposed, so far as immediately relevant, to define a retail establishment as one deriving

[7] See *Martino* v. *Michigan Window Cleaning Co.*, 327 U. S. 173; *Boutell* v. *Walling*, 327 U. S. 463. See also *McComb* v. *Factory Stores Co.*, 81 F. Supp. 403, *McComb* v. *Diebert*, 16 CCH Labor Cas. ¶ 64,982.

75% of its income from retail sales and then to define as retail sales those made to private individuals for personal or family consumption, sales of the same items to any other customer if not for resale and if similar in type and quantity, and sales to farmers of goods of the type and quantity used on the ordinary farm. When Congress convened in 1949, a number of bills were introduced to amend the Act in various respects. The bill reported out by the House committee and the substitute measure first debated by the House adopted the Administrator's basic proposal, but a further substitute backed by an opposing coalition and introduced as an amendment during the debates finally prevailed and was sent to the Senate.[8] This bill as passed contained the definition of exempt retail and service establishments that became law in 1949 and which remains the law today.[9] The Senate during the debate of its own committee-reported bill, which did not amend the retail exemption, amended the Senate bill to conform to the House's revision of § 13 (a)(2).[10] Thus, when the House-Senate conference committee met to iron out other differences in their respective versions of the legislation, uniformity in the amendment to § 13 (a)(2) already existed. The debates on the retail exemption in each House were sub-

[8] The bill reported out of committee was H. R. 3190, 81st Cong., 1st Sess., accompanied by H. R. Rep. No. 267. The first substitute was H. R. 5856, brought to debate by H. R. Res. 183. The final, successful version retained the number H. R. 5856 but was drawn from H. R. 5894. See generally 6 BNA Lab. Rel. Rep., p. 90:459 (1961).

[9] The only difference between the 1949 version of § 13 (a)(2) and current law derives from the 1961 amendment to the section, which is not relevant in this case. See n. 4, *supra*, and accompanying text.

[10] The bill reported out of committee was S. 653, 81st Cong., 1st Sess., accompanied by S. Rep. No. 640. The amendment was offered at 95 Cong. Rec. 12491 and passed at 95 Cong. Rec. 12520.

stantial and several legislative documents construe the amended section.[11]

In light of the legislative history, the first question to be faced is whether the 1949 amendment requires the Secretary to treat as retail any sale of goods or services not for resale that is most customarily described or labeled as a retail transaction by those in the industry, acting of course in good faith. If the answer were yes, then both Idaho Sheet and Steepleton would deserve exemptions without more ado, since admittedly the predominant or sole usage of those in the industry applied the term retail to the questioned sales. It should not be said that this reading is without support. Most importantly, it would appear to follow from the most literal reading of the statute; the phrase "recognized as retail . . . in the particular industry" well lends itself to an inquiry into how the businessmen concerned term their dealings. Some statements in the debates explicitly foster this reading, for example, the comment by Senator Holland who sponsored the amendment in the Senate that under his approach, "for different commodities . . . we have to find the definition which is understood by the people dealing in that industry." 95 Cong. Rec. 12519.[12] We do not agree with the Government

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[11] The principal debates appear at various points in 95 Cong. Rec. 11002–11203 (House), 12490-12520 (Senate). No initial committee reports discuss the ultimately successful version of § 13 (a)(2) but a pertinent statement of the House members of the conference committee appears in H. R. Conf. Rep. No. 1453, 81st Cong., 1st Sess., pp. 24–26 (hereafter cited as H. R. Conf. Rep.). There is also a relevant but less authoritative statement of the majority of Senate conferees (hereafter cited as Senate Conf. Majority Statement) appearing at 95 Cong. Rec. 14877.

[12] Other comments in some measure favoring the most literal construction are those assuming that each industry has an established understanding of what is a retail sale, *e. g.*, 95 Cong. Rec. 12502 (remarks of Senator Holland), 12516 (remarks of Senator

that this reading is necessarily infirm because the Secretary and courts may have to seek a standard or predominant use of the word retail among several uses extant in the industry. Certainly we do not agree with the further suggestion that this literal reading must give the industry self-determination as to whether the exemption applies; courts are not incompetent to distinguish between a legitimized usage fixed by established practice and one recently instituted with the aim of avoiding the law.

On balance, however, the arguments against this literal reading are more persuasive. At the start, such a reading would attribute to Congress a purpose going well beyond its reiterated explanation that the amendment was designed to overturn the sweeping principle of the *Roland* case. The legislative history is replete with evidence that the target of the amendment was *Roland*'s proposition that no sale to a business purchaser could be a retail sale, which Senator Holland condemned by comparing the different status it gave to the sale of a batch of towels to a housewife and the same sale to a hotelkeeper. 95 Cong. Rec. 12494.[13] Further, for every suggestion in the debates that Congress intended also wholly to revamp the exemption by substituting an overriding industry-usage test, there are statements that

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Taft); those few which seem to equate "recognized as retail" with "regarded as retail," 95 Cong. Rec. 11003 (remarks of Mr. Lucas, sponsor of the prevailing version in the House), 12502 (remarks of Senator Holland); and one or two suggesting that a discount sale may qualify as retail, 95 Cong. Rec. 11003 (remarks of Mr. Lucas), 11199 (remarks of Mr. McConnell).

[13] See House Conf. Rep., p. 24 ("This clarification [the amended § 13 (a)(2)] is needed in order to obviate the sweeping ruling of the Administrator and the courts that no sale of goods or services for business use is retail. See *Roland Electrical Co.* v. *Walling* . . ."); 95 Cong. Rec. 11003 (remarks of Mr. Lucas); 95 Cong. Rec. 11203 (remarks of Mr. Celler).

point in the other direction. Thus, Senator Holland observed that his amendment would not undo the commonly held view that quantity sales at discount prices are generally nonretail.[14] It was said that the "recognizing" is done by the Administrator and the courts as well as the merchant, 95 Cong. Rec. 12510 (remarks of Senator Holland), and that due weight must be given to the "actual practice" in the industry, Senate Conf. Majority Statement, 95 Cong. Rec. 14877, and the "well-settled habits of business," 95 Cong. Rec. 12510 (remarks of Senator Holland). The lists set forth of potentially retail businesses include almost only those selling consumer goods and services. See House Conf. Rep., p. 25 (quoted p. 12, *infra*); 95 Cong. Rec. 11003–11004 (remarks of Mr. Lucas); 95 Cong. Rec. 12502 (remarks of Senator Holland). There are denials that the industries' own interpretations of a retail sale will be decisive.[15]

The conclusive consideration for us in rejecting the industry usage test is that it would compel results flatly inconsistent with those Congress explicitly contemplated

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[14] "Of course if . . . [a sale is 'made in such quantity that discounts are allowed'] it comes in the category of wholesale sales." 95 Cong. Rec. 12501. Perhaps more ambiguously, Senator Holland also stated: "If sales were made in sufficient quantity so there would be a discount and they would be regarded not as retail sales, but as wholesale sales, they would lose their exemption." 95 Cong. Rec. 12497. See also 95 Cong. Rec. 12505. But cf. 95 Cong. Rec. 11003 (remarks of Mr. Lucas).

[15] "Mr. DOUGLAS. I understand that the interpretation which would be made would be that given to 'retail sale' by a trade association.

"Mr. HOLLAND. That is one criterion, of course; but I do not believe the Senator from Illinois, and certainly not the Senator from Florida, would wish to delegate full authority in the matter to a trade association or other interested group." 95 Cong. Rec. 12501.

See also 95 Cong. Rec. 12510 (remarks of Senator Holland).

and might indeed work a major revolution in the Act's coverage not acknowledged in any legislative statement or report before us. The prime example of this threatened inconsistency is the problem presented to this Court in 1959 by *Mitchell* v. *Kentucky Finance Co.*, 359 U. S. 290, where a business making small personal loans and purchasing conditional sale contracts from retailers claimed to be an exempt retail or service establishment. Although the company introduced persuasive evidence that the industry regarded its transactions as retail, the Court denied the exemption in the face of the legislative history indicating a limited purpose for the 1949 amendment and containing an express statement that "[t]he amendment does not exempt banks, insurance companies, building and loan associations, credit companies, newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc., because there is no concept of retail selling or servicing in these industries." House Conf. Rep. pp. 25–26. See Senate Conf. Majority Statement, 95 Cong. Rec. 14877. If weight is to be given to statements about the nonretail status of quantity sales at discounts, see n. 14, *supra*, congressional intent would be similarly frustrated by the truck tire industry's retail designation of all sales not for resale no matter how great the quantity and discount. In view of the use of the word retail in the truck tire and credit industries, it would hardly be surprising to find that newspaper, telephone, or gas and electric companies label their sales to consumers as retail. Yet the legislative history is so explicitly opposed to the extension of the retail exemption to such businesses as to provide the final argument against adopting an industry usage test that could dictate that result.

Since we reject the industries' usage as the single touchstone, the question arises what meaning is to be given to the term retail. In approaching this question

we agree with the Secretary that it is generally helpful to ask first whether the sale of a particular type of goods or services can ever qualify as retail whatever the terms of sale; if and only if the answer is affirmative is it then necessary to determine the terms or circumstances that make a sale of those goods or services a retail sale.

Plainly the typical retail transaction is one involving goods or services that are frequently acquired for family or personal use. As examples of sales that could qualify as retail, the House Conference Report lists those made "by the grocery store, the hardware store, the coal dealer, the automobile dealer selling passenger cars or trucks, the clothing store, the dry goods store, the department store, the paint store, the furniture store, the drug store, the shoe store, the stationer, the lumber dealer, etc. . . . ." House Conf. Rep., p. 25 (sale of farm machinery is another example given). See also 95 Cong. Rec. 11003–11004 (remarks of Mr. Lucas); 95 Cong. Rec. 12502 (remarks of Senator Holland. Of course Congress' conceded intent to overrule the *Roland* principle means sales of such goods or services can be retail "whether made to private householders or to business users," House Conf. Rep., p. 25, but the goods and services listed nearly all share the common characteristic that they are often purchased by householders. The legislative recital of telephone, gas and electric, and credit companies along with a number of others as businesses outside the exemption, see p. 11, *supra*, demonstrates that not everything the consumer purchases can be a retail sale of goods or services, but the breadth of this qualification need not here be explored.

What is important for this decision is that Congress also intended that the retail exemption extend in some measure beyond consumer goods and services to embrace certain products almost never purchased for family or noncommercial use. An indisputable example is the sale of farm implements. See House Conf. Rep., p. 25.

Another instance is trucks, at least of some varieties, whose "retailability" is assumed in the legislative history, *e. g.*, 95 Cong. Rec. 12497 (remarks of Senator Holland), and confirmed by the presence of another exemption in the Act that would otherwise be difficult to understand.[16] See also 95 Cong. Rec. 12495 (remarks of Senator Holland) (retailability of modest office desk). We cannot draw a precise line between such articles and those like industrial machinery which can never be sold at retail, see House Conf. Rep., p. 26, but a few characteristics of items like small trucks and farm implements may offer some guidance: their employment is very widespread as is that of consumer goods; they are often distributed in stores or showrooms and by means not dissimilar to those used for consumer goods; and perhaps it can be said that they are very frequently used in commercial activities of limited scope. While the list of strictly commercial items whose sale can be deemed retail is presumably very small, their existence precludes use of the uncomplicated "consumer goods" test proposed by the Administrator in 1949. See pp. 6–7, *supra.*

Within the category of goods and services that can be sold at retail, naturally not every sale can be so classified. The exemption itself excludes any sale for resale and beyond that, references in the legislative history, n. 14, *supra,* and common parlance certainly suggest that the term retail becomes less apt as the quantity and the price discount increases in a particular transaction. Again,

[16] Section 13 (a)(19), added in 1961 by 75 Stat. 73, 29 U. S. C. § 213 (a)(19) (1964 ed.), exempts from the minimum wage and overtime pay requirements "any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements" regardless of whether the establishment meets the further tests of § 13 (a)(2), notably those added in 1961, see n. 4, *supra,* and accompanying text. Quite evidently this section contemplates that a business primarily selling trucks may be a retail establishment.

we do not believe the word-usage of the industry must be given conclusive force. The legislative comments on discounting just cited are to the contrary; and the statute cannot easily be read to make usage control whether a particular sale is retail after we have rejected that test in deciding whether sale of a given item can ever be retail. The Secretary has in fact quite properly looked carefully at usage and practice in each industry before taking a position, 29 CFR § 779.323 (1965), but he cannot be hamstrung by the terminology of a particular trade. In view of the diversity of structure and marketing practices in different industries, flexibility is certainly appropriate, and we do not here further attempt to adduce general rules. We do note that the considerable discretion possessed by the Secretary as the one responsible for the actual administration of the Act should not be understressed. *Boutel* v. *Walling*, 327 U. S. 463, 471; see *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549.

III.

In light of the premises now established, resolution of the two cases before us can be accomplished readily. Turning first to Idaho Sheet Metal Works, we believe it is disqualified as a retail establishment by the 83% of its gross income derived from metal work relating to the potato processing equipment. The company has stressed the wide public it serves, the display racks and other retail facilities in its building, the irregular intervals at which work on the potato equipment is performed, and the company's lineage tracing back to the "tin shops" of yesterday. All these factors may bear upon the classification of its other sales, and if those were its sole business or three-quarters of it the company might well deserve the exemption. But § 13 (a)(2) is explicit in its treatment of establishments whose sales are variegated: a business is characterized by its sales and no more than

25% of the dollar volume may derive from sales designated nonretail without loss of the exemption. See n. 2, *supra*. In this instance 83% of the gross income is made by sale or servicing of the potato processing equipment and we do not believe those transactions before us can be labeled retail whatever the particular terms.

This last conclusion follows naturally from the admitted facts. The pretrial order described the potato equipment fabricated and maintained by Idaho Sheet as vats, storage tanks, hoods, elevator buckets, and chutes. Hoods were described at trial by one purchaser as being "five feet square on the bottom and about four feet high where they go to the vent stacks." He also testified that the tanks held as much as "5,000 pounds of peeled potatoes," and that chutes were about 12 feet long. If this testimony is not fairly representative of the nature of the equipment under scrutiny, there is no indication of that from Idaho Sheet, upon whom lies the burden of establishing the facts requisite to an exemption. *Arnold* v. *Ben Kanowsky, Inc.*, 361 U. S. 388. The type of equipment described plainly appears to have no private or noncommercial utility. Nor does it bear much resemblance to those strictly commercial articles earlier named that may be sold at retail. Unlike small trucks and farm equipment, the market for these goods is highly limited, and far from being stock items purchased off the shelf, these articles were generally fabricated to meet individual specifications.[17] In the 83% of its business relating to the potato equipment, Idaho Sheet seems hardly distinguishable from "an establishment engaged

[17] The company relies upon *Wirtz* v. *Modern Trashmoval, Inc.*, 323 F. 2d 451, in which the Fourth Circuit as an alternative ground of decision held a trash collection business to be a retail or service establishment under the Act. We need go no further than to say the case is quite distinguishable; trash removal is not only a widespread need in the commercial world but is required by private families.

in the sale and servicing of manufacturing machinery and manufacturing equipment used in the production of goods," which the House Conference Report flatly stated could not be exempt. House Conf. Rep., p. 26. Since in our view this potato equipment cannot be the subject of a retail sale, we have no occasion to consider the company's claim that the pricing and quantity of its particular sales of the equipment conform to retail standards.

The second case, involving the Steepleton tire business, is in some respects more intricate. The Government has alleged, and Steepleton does not deny, that better than half the company's dollar volume derives from sales to companies operating fleets of commercial vehicles and other heavy industrial machinery such as earth-moving equipment. The Government's first ground for withholding the exemption is that tire transactions relating to large trucks and industrial vehicles are intrinsically nonretail whatever the terms. It analogizes these vehicles to industrial machinery and then would treat the tires just as the trucks. And it stresses the ties between these vehicles and interstate commerce.

Admitting that the argument has force, we do not accept it. Among the few strictly commercial articles that Congress pretty plainly viewed as retailable were trucks in at least some varieties, as we have already shown. No reason appears why the sale of tires for those trucks should be distinguished and not allowed to qualify as retailable items. The strength of the Government's position lies in its readiness to separate big trucks and tires from little trucks and tires. The Secretary, however, seemingly has chosen not to classify truck tires on this basis but instead treats all truck tires as capable of being sold at retail.[18] A decision of this

[18] 29 CFR § 779.373 (1965) relevantly provides that for purposes of § 13 (a)(2) "all sales of tires, tubes, accessories and tire repair

kind, no doubt turning in part on problems of administration and facets of industry practice, clearly implicates the Secretary's discretion, and we see no cause to disturb its exercise in this case.

Steepleton is, nevertheless, deprived of the retail establishment exemption because—as the Government alternatively contended—it has failed to show that the tire dealings in question were made on terms and in circumstances that qualify them as retail within the Secretary's guidelines. The guidelines class as nonretail all sales to fleets of five or more vehicles at "wholesale prices," a wholesale price being defined as that charged on sales for resale or on sales to 10-vehicle fleets. See n. 18, *supra*. These guidelines, reportedly designed after inquiry into industry practices, are quite evidently aimed at excluding from the retail category sales generally made at significant discounts and in quantity. Given the common conception of the term retail and references in the legislative history to discount sales, see n. 14, *supra*, we see no reason not to sustain these guidelines; indeed, the company does not even appear to discuss them, save as is implicit in its claims that the Secretary's position here does not correspond to word usage in the industry.

In concluding that Steepleton has not proved itself exempt, a certain indefiniteness in the record should be noted. The Government showed at trial that many of

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services, including retreading and recapping" are classified as retail, with a series of exceptions including:

"(d) Sales to fleet accounts at wholesale prices: . . . a 'fleet account' is a customer operating five or more automobiles or trucks for business purposes. Wholesale prices . . . are prices equivalent to, or less than, those typically charged on sales for resale. . . . If the establishment makes no sales of truck tires for resale, the wholesale price . . . [is] the price charged . . . on sales of truck tires to fleet accounts operating 10 or more commercial vehicles, or if the establishment makes no such sales . . . [it is] the price typically charged in the area on [such] sales . . . ."

the sales were to large fleets, that a number of purchasers said they received discounts, that the practice in the industry was to grant significant discounts for fleet sales, that some sales were for resale or pursuant to bids to public agencies, and other facts directed at showing nonexemption under the guidelines. Despite this evidence, there is unclarity as to the precise percentages of dollar volume attributable to the various sales that the guidelines label nonretail. However, the burden of proof respecting exemptions is upon the company, as earlier indicated, and since we uphold the Secretary's test, that burden has not been met. If Steepleton had alleged on appeal that it could meet the Secretary's standards if they prevailed, even then we would hesitate to order a remand since the Secretary's position has been known from the outset. In all events, Steepleton has not even claimed in this Court that the Secretary's standards could be met.

The judgment of the Court of Appeals in No. 30 is affirmed; the judgment of the Court of Appeals in No. 31 is reversed.

It is so ordered.